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No. 96-308

In The Supreme Court of the United States

October Term, 1996

Loyal American Life Insurance Company, Inc.,
Petitioner,

v.

Sue M. Mattiace,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHETHER RECOGNITION OF THE TORT OF BAD FAITH, IN LIGHT OF THE MANNER IN WHICH THE ALABAMA SUPREME COURT HAS INTERPRETED AND APPLIED ARTICLE I, SECTION 11 OF THE ALABAMA CONSTITUTION OF 1901 VIOLATES PETITIONER LOYAL AMERICAN'S RIGHT TO EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

RULE 29.1 STATEMENT

Loyal American Life Insurance Company is a subsidiary of Great American Life Insurance Company. Great American Life Insurance Company is a subsidiary of American Annuity Group. American Annuity Group is a subsidiary of Great American Insurance. Great American Insurance is a subsidiary of American Financial Corporation. American Financial Corporation is a subsidiary of American Financial Group, Inc.

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OPINION BELOW

See Loyal American Life Insurance Company, Inc. v. Mattiace, —— So. 2d ——, 1996 WL 275242 (Ala., May 24, 1996), attached hereto as Appendix A.

JURISDICTIONAL GROUNDS

This appeal is premised upon the jurisdiction of this Court, as stated in Article III, Section 2 of the Constitution of the United States and reiterated in Supreme Court Rule 10, to decide questions of federal law upon review on writ of certiorari. The order and opinion from the Alabama Supreme Court, filed herewith as Appendix A, was rendered on May 24, 1996.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Applicable Constitutional Provisions:

U.S. Const., Amendment VII:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Ala. Const. (1901) Art. I, § 11:

> That the right of trial by jury shall remain inviolate.

Ala. Const. § 42. Legislative, executive and judicial departments established.

> The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

Ala. Const. § 43. Separation of powers.

> In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative or judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.

Applicable Statutes:

Ala. Code § 27-14-7. Representations and misrepresentations, etc.

(a) All statements and descriptions in any application for an insurance policy or annuity contract, or in negotiations therefor, by, or in behalf of, the insured or annuitant shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy or contract unless either:

(1) Fraudulent;

(2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or

(3) The insurer in good faith would either not have issued the policy of contract, or would not have issued a policy or contract at the premium rate as applied for, or would not have issued a policy or contract in as large an amount or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

(b) No plea of misrepresentation or fraud in connection with the issuance of a life insurance policy or annuity contract shall be filed unless accompanied by a payment into court of all premiums paid on the policy or contract.

Ala. Code § 6-11-21. Punitive damages not to exceed $250,000; exceptions.

An award of punitive damages shall not exceed $250,000, unless it is based upon one or more of the following:

(1) A pattern or practice of intentional wrongful conduct, even though the damage or injury was inflicted only on the plaintiff; or

(2) Conduct involving actual malice other than fraud or bad faith not a part of a pattern or practice; or,

(3) Libel, slander, or defamation.

Ala. Code § 6-11-23. No presumption of correctness; court to conduct hearings; admissible relevant evidence; trial court to independently reassess award of punitive damages.

(a) No presumption of correctness shall apply as to the amount of punitive damages awarded by the trier of the fact.

(b) In all cases wherein a verdict for punitive damages is awarded, the trial court shall, upon motion of any party, either conduct hearings or receive additional evidence, or both, concerning the amount of punitive damages. Any relevant evidence, including but not limited to the economic impact of the verdict on the defendant or the plaintiff, the amount of compensatory damages awarded, whether or not the defendant has been guilty of the same or similar acts in the past, the nature and the extent of any effort the defendant made to remedy the wrong and the opportunity or lack of opportunity the plaintiff gave the defendant to remedy the wrong complained of shall be admissible; however, such information shall not be subject to discovery, unless otherwise discoverable, until after a verdict for punitive damages has been rendered. After such post verdict hearing the trial court shall independently (without any presumption that the award of punitive damages is correct) reassess the nature, extent, and economic impact of such an award of punitive damages, and reduce or increase the award if appropriate in light of all the evidence.

Ala. Code § 6-11-24. No presumption of correctness to apply to damages on appeal.

(a) On appeal, no presumption of correctness shall apply to the amount of punitive damages awarded.

(b) The appellate court shall independently reassess the nature, extent and economic impact of such an award and reduce or increase the award if appropriate in light of all the evidence.

Ala. Code § -5-544. Recovery of noneconomic losses; limitation of such losses; mistrial if jury advised of limitation.

(a) In any action for injury whether in contract or in tort against a health care provider based on a breach of the standard of care, the injured plaintiff and spouse upon proper proof may be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, and other nonpecuniary damage.

(b) In no action shall the amount of recovery for noneconomic losses, including punitive damages, either to the injured plaintiff, the plaintiff's spouse, or other lawful dependents or any of them together exceed the sum of $400,000. Plaintiff shall not seek recovery in any amount greater than the amounts described herein for noneconomic losses. During the trial of any action neither the court nor any party shall advise or infer to the jury that it may not return an award for noneconomic losses in excess of an amount specified herein; in the event the jury is so advised or such inference is made, the trial court, upon motion of an opposing party, shall immediately declare a mistrial. Any verdict returned which includes an award for noneconomic losses in an amount greater than that permitted herein shall be reduced by the trial court to an amount which will include an award of noneconomic losses no greater than that permitted herein or to such lesser sums as the trial court deems appropriate in accordance

with prevailing standards for reducing excessive verdicts.

Ala. Code § 6-5-547. One million dollar limit on judgments; mistrial if jury advised of limitation.

> In any action commenced pursuant to Section 6-5-391 or Section 6-5-410, against a health care provider whether in contract or in tort based on a breach of the standard of care the amount of any judgment entered in favor of the plaintiff shall not exceed the sum of $1,000,000. Any verdict returned in any such action which exceeds $1,000,000 shall be reduced to $1,000,-000 by the trial court or such lesser sum as the trial court deems appropriate in accordance with prevailing standards for reducing excessive verdicts. During the trial of any action brought pursuant to Section 6-5-391 or 6-5-410 neither the court nor any party shall advise or infer to the jury that it may not return a verdict in excess of $1,000,000; in the event the jury is so advised or such inference is made the court, upon motion of an opposing party, shall immediately declare a mistrial. The maximum amount payable under this section, $1,000,000, shall be adjusted on April fifteenth of each year to reflect any increase or decrease during the preceding calendar year in the consumer price index of the United States Department of Commerce. Said adjustment shall equal the percentage change in the consumer price index during the preceding calendar year.

STATEMENT OF THE CASE

The facts at issue in the underlying dispute are not material to the constitutional issue presented herein. Petitioner relies upon the case law discussed in this brief as demonstrating the violation of its right to equal protection of the laws of the State of Alabama as guaranteed by the Fourteenth Amendment to the United States Constitution.

Loyal American raised and preserved the constitutional issues for which review is sought in both the trial court and the Supreme Court of Alabama in the proceedings below. On May 3, 1994, Loyal American filed an amended answer asserting the following affirmative defenses:

> EIGHTH AFFIRMATIVE DEFENSE
>
> Plaintiff's bad faith claim violates Loyal American's right to a jury trial as guaranteed by the Alabama Constitution.
>
> NINTH AFFIRMATIVE DEFENSE
>
> The imposition of damages pursuant to plaintiff's bad faith claim violates the equal protection guarantees of the 5th and 14th amendments of the United States Constitution and the sections 1, 6 and 22 of the Declarations of Rights of the Alabama Constitution.

Loyal American Life Insurance Company, Inc.'s Amended Answer to Plaintiff's Amendment to the Complaint. On May 24-25, 1995, Loyal American filed its Motions for Directed Verdict at the Close of Plaintiff's Evidence and at the Close of All Evidence. Loyal American again raised the constitutional issues presented in this petition. Loyal American argued as follows:

> 24. Plaintiff's bad faith claim violates Loyal American's right to a jury trial as guaranteed by the Alabama Constitution. Prior to the adoption of the Alabama Constitution in 1901, there was no cause of action for bad faith recognized at common law. A bad faith action violates the right by jury because the Alabama Supreme Court has, by judicial fiat, created a cause of action that did not exist when the Constitution was adopted.
>
> > The clause "forbid[s] the state through the legislative, *judicial*, or executive department—*one and all*—from ever burdening, disturbing, qual-

> ifying, or tampering with this right to the prejudice of the people" . . . Section 11 "freezes" the right to trial by jury as that right existed in 1901, the date of the ratification of our present Constitution.
>
> *Moore v. Mobile Infirmary Association*, 592 So. 2d 156, 159 (Ala. 1991). Before the judicial creation of a bad faith claim, an insurer, such as Loyal American, was only subject to damages for the amount of the claim with interest plus possible consequential damages. Punitive damages were not recoverable for claims arising out of the denial of a claim for benefits under an insurance policy. The creation of a bad faith cause of action constituted a "burdening, disturbing, qualifying or tampering" with the right to a trial by jury as it was "frozen" by the Alabama Constitution of 1901.
>
> 25. The imposition of damages pursuant to Plaintiff's bad faith claim violates the equal protection guarantees of the 5th and 14th amendments of the United States Constitution and the sections 1, 6 and 22 of the Declarations of Rights of the Alabama Constitution.

Defendant Loyal American Life Insurance Company's Motion for Directed Verdict at the Close of Plaintiff's Evidence; Defendant Loyal American Life Insurance Company's Motion for Directed Verdict at the Close of All Evidence. The Trial Court denied Loyal American's Motions for Directed Verdict. As to the Motion filed at the Close of Plaintiff's Evidence, the Trial Court stated:

> I understand that you and Mr. O'Bannon both have very ably briefed these points, you, I think, have filed all the requisite motions, you have filed motions in limine where if the Court has erred, as I do from time to time, it's very carefully preserved, and if there should be a verdict adverse to your client, I'm sure the matter will come under appellate review and I will be more enlightened the next time these questions are addressed to me, as will counsel.

> And the motion for a directed verdict at the close of plaintiff's evidence will be denied and the case will be with the defendant.

Record on Appeal at 291. As to the Motion filed at the Close of All Evidence, the Trial Court stated:

> All right. Well, the written motion of the defendant moving for directed verdict at the close of the evidence has been marked filed by me and is on file. And after consideration of that motion and Mr. Carr's additional comments for the record, the motion for a directed verdict is denied.

Record on Appeal at 630. After jury returned a verdict in favor of Respondent and awarded damages on the bad faith claim, Loyal American filed Defendant's Motion for JNOV, or in the Alternative, for New Trial, or in the Alternative, for Remittitur. Loyal American again raised the constitutional issues and argued:

> 31. Plaintiff's bad faith claim violates Loyal American's right to a jury trial as guaranteed by the Alabama Constitution. Prior to the adoption of the Alabama Constitution in 1901, there was no cause of action for bad faith recognized at common law. A bad faith action violates the right to trial by jury because the Alabama Supreme Court has, by judicial fiat, created a cause of action that did not exist when the Constitution was adopted.

> > The clause "forbid[s] the state through the legislative, *judicial*, or executive department—*one and all*—from ever burdening, disturbing, qualifying, or tampering with this right to the prejudice of the people" . . . Section 11 "freezes" the right to trial by jury as that right existed in 1901, the date of the ratification of our present Constitution.

Moore v. Mobile Infirmary Association, 592 So. 2d 156, 159 (Ala. 1991) (emphasis added). Before the judicial creation of a bad faith claim, an insurer,

such as Loyal American, was only subject to damages for the amount of the claim with interest plus possible consequential damages. Punitive damages were not recoverable for claims arising out of the denial of a claim for benefits under an insurance policy. The creation of a bad faith cause of action constituted a "burdening, disturbing, qualifying or tampering" with the right to a trial by jury as it was "frozen" by the Alabama Constitution of 1901.

32. The imposition of damages pursuant to Plaintiff's bad faith claim violates the equal protection guarantees of the 5th and 14th amendments of the United States Constitution and the sections 1, 6 and 22 of the Declarations of Rights of the Alabama Constitution.

33. Plaintiff's claim for punitive damages is invalid in that the authority on which the claim is based is unconstitutional on the following joint and several constitutional grounds: a) The prohibition against ex post facto law is violated; b) Due process of law is denied; c) The equal protection of the laws is denied; d) Excessive fines and unusual punishments are imposed; e) Defendant's privileges or immunities are abridged; f) The authority is arbitrary, capricious or unreasonable; g) The authority or its effect is a law impairing the obligations of contract; h) The authority and its effect deprives defendant of liberty or property without due process of law.

34. With regard to the judgment on the punitive damage verdict, the lack of sufficient standards violates the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 6 of the Alabama Constitution (1901). Further, the imposition of damages violates the Eighth Amendment to the United States Constitution. The judgment also violates Article I, Sections 15 and 22 of the Alabama Constitution (1901) and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The procedures for the award of punitive damages violates this

> defendant's right to a jury trial pursuant to state and federal constitutions.

Defendant's Motion for JNOV, or in the Alternative, for New Trial, or in the Alternative, for Remittitur. On July 12, 1995, the Trial Court denied Loyal American's post-trial motions.

Loyal American filed its Notice of Appeal to the Alabama Supreme Court on August 17, 1995. Loyal American specifically appealed the Trial Court's denial of its Motions for Directed Verdict and Motion for JNOV. In its brief on appeal, Loyal American argued as follows:

> Plaintiff's bad faith claim violates Loyal American's right to a jury trial as guaranteed by the Alabama Constitution. This Court's tort reform cases have established that the right to jury trial clause of the 1901 Alabama Constitution, Ala. Const. art. I, § 11 (1901), prevents the legislative, executive and judicial departments from burdening the right as it existed in 1901.
>
> > The clause "forbid[s] the state through the legislative, *judicial,* or executive department—*one and all*—from ever burdening, disturbing, qualifying, or tampering with this right to the prejudice of the people" . . . Section 11 "freezes" the right to trial by jury as that right existed in 1901, the date of the ratification of our present Constitution.
>
> *Moore v. Mobile Infirmary Association*, 592 So. 2d 156, 159 (Ala. 1991) (emphasis added). This Court's rationale is based upon the proposition that the adoption of the 1901 Constitution froze the rights as they existed at that time. *See Smith v. Schulte*, —— So. 2d ——, 1995 WL 491245 (Ala. 1991); *Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993); *Moore*, 592 So. 2d 156; and *Gilbreath v. Wallace*, 292 Ala. 267, 292 So. 2d 651 (1974).

This Court has relied upon this proposition to declare the certain tort reform statutes unconstitutional. *See Smith*, 1995 WL 491245 (declaring $1,000,000 cap on jury awards in medical malpractice cases unconstitutional); *Henderson*, 627 So. 2d 878 (declaring $250,000 cap on punitive damages unconstitutional); and *Moore*, 592 So. 2d 156 (declaring $400,000 cap on noneconomic damages in medical malpractice cases unconstitutional). As this Court recognized in *Moore*, the section 11's prohibition on interference with the right to jury trial is not limited to the legislative and executive departments of the State. *Moore*, 592 So. 2d at 159. The same prohibition prevents this Court from "ever burdening, disturbing, qualifying, or tampering with this right to the prejudice of the people." *Id.*

Prior to the adoption of the Alabama Constitution in 1901, there was no cause of action for bad faith recognized at common law. This Court, by judicial fiat, created the tort of bad faith with its decision in *Chavers* in 1981. *See Chavers*, 405 So. 2d 1. Only three (3) years before *Chavers*, this Court refused to recognize such a cause of action. *See Childs*, 359 So. 2d 1146. Accordingly, before 1981, an insurer, such as Loyal American, had a right not to be subjected to a claim for damages for personal injury, inconvenience, annoyance, mental anguish or suffering and/or punitive damages arising out of the failure to pay benefits under an insurance policy. *See Vincent v. Blue Cross & Blue Shield of Ala.*, 373 So. 2d 1054, 1056 (Ala. 1979); *Stead v. Blue Cross & Blue Shield of Ala.*, 346 So. 2d 1140, 1141 (Ala. 1977). The creation of a bad faith cause of action constituted a "burdening, disturbing, qualifying or tampering" with the right to a trial by jury as it was "frozen" by the Alabama Constitution of 1901. Accordingly, this Court's judicially created cause of action violates Loyal American's right to jury trial as guaranteed by section 11.

A decision by this Court, as indicated in *dicta* in *Henderson*, that it is empowered to change the rights

in violation of section 11, violates the equal protection guarantees of the Fourteenth Amendment of the United States Constitution and of the Alabama Constitution, if indeed such a guarantee exists under the Alabama Constitution standing by itself.[1] This Court has relied upon section 11 to strike down a statutory limit on punitive damages which undisputedly a plaintiff had no right to recover. *See City Bank of Ala. v. Eskridge*, 521 So. 2d 931 (Ala. 1988); *Alabama Power Co. v. Rembert*, 282 Ala. 5, 208 So. 2d 205 (1968); *Treadwell Ford, Inc. v. Leek*, 272 Ala. 544, 133 So. 2d 24 (1961); *Lehigh Portland Cement Co. v. Sharit*, 234 Ala. 40, 173 So. 386 (1937); *Birmingham Electric Co. v. Shepard*, 215 Ala. 316, 110 So. 604 (1926); *Dowling v. Garner*, 195 Ala. 493, 70 So. 150 (1915); *Meighan v. Birmingham Terminal Co.*, 165 Ala. 591, 51 So. 775 (1910); *Louisville & Nashville R. R. Co. v. Street*, 164 Ala. 155, 51 So. 306 (1909); and *Comer v. Age Herald Publishing Co.*, 151 Ala. 613, 44 So. 673 (1907). It cannot be disputed that Loyal American, prior to 1981, had a right not to be subjected to damages other than contractual damages for the breach of an insurance contract.

Accordingly, equal protection of the law mandates a decision that Alabama's bad faith law violates section 11. The equal protection guarantees of the Fourteenth Amendment and the Alabama Constitution in conjunction therewith prevent the application of the law in a fashion that favors plaintiffs and discriminates against defendants. If, as this Court has held, section 11 "freezes" the rights as of the adoption of the 1901 Constitution, equal protection requires this Court to declare the law of "bad faith" in Alabama unconstitutional.

Brief of Appellant. The Alabama Supreme Court summarily rejected Loyal American's constitutional issue in its opinion on May 24, 1996. *See* Appendix A.

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[1] *See Smith*, —— So. 2d ——, 1995 WL 491245 at 15-16 (Houston, J., dissenting) and cases cited therein.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Under the varying interpretations by the Alabama Supreme Court applied to art. I, section 11 of the 1901 Alabama Constitution, the recognition of the tort of bad faith violates Loyal American's right to equal protection as guaranteed by the Fourteenth Amendment of the United States Constitution. In case after case, the Alabama Supreme Court has held that art. I, section 11 of the Alabama Constitution effected a "freezing" of the right to trial by jury as of 1901, the date of adoption of the last Alabama Constitution.

However, art. I, section 11 has now been construed as granting the Alabama Supreme Court the authority, through judicial case law, to recognize new causes of action—causes of action not recognized as of the 1901 Alabama Constitution and which certainly were not entitled to trial by jury as of 1901. At the same time, the Alabama Supreme Court has used art. I, section 11 to strike down numerous legislative enactments under the guise of protecting the right to trial by jury. Because of the inconsistent and arbitrary manner in which art. I, section 11 has been applied, the recognition of the tort of bad faith—a new cause of action which did not exist as of 1901—Loyal American has been denied equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution.

ARGUMENT

I. APPLICABLE STANDARDS.

This Court has stated that "[e]qual protection analysis requires strict scrutiny of a legislative classification if the classification impermissibly interferes with the exercise of a fundamental right." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). Although not previously identified by this Court as a fundamental right for purposes of equal protection analysis, Petitioner asserts that the right to trial by jury should be recognized as a

fundamental right. The right to trial by jury is a Constitutionally-protected right: the right to trial by jury in criminal actions is protected under Amendment VI of the United States Constitution while the right to trial by jury in civil actions is protected under Amendment VII. Likewise, the Alabama Supreme Court has identified the right as an "inviolate" "fundamental, constitutionally guaranteed right." *See Gilbreath v. Wallace*, 292 Ala. 267, 292 So. 2d 651 (Ala. 1974); *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1378 (Ala. 1986). Moreover, the right to trial by jury is a cornerstone upon which this country's government is premised. For these reasons, the right to trial by jury should be classified a fundamental right.

Accordingly, "any government practice or statute which restricts 'fundamental rights' or which contains 'suspect classifications' is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available." *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

Regardless of whether strict scrutiny or some other level of scrutiny identified by this Court is applied, Petitioner asserts that the interpretation and application of art. I, section 11 of the Alabama Constitution of 1901 has deprived it of its right to equal protection of the laws. The right to equal protection of the law requires that any classification created by a state must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Johnson v. Robison*, 415 U.S. 361 (1974). Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. *Romer v. Evans*, 116 S. Ct. 1620 (1996).

II. DUE TO THE INTERPRETATION GIVEN TO ARTICLE I, SECTION 11 OF THE 1901 ALABAMA CONSTITUTION, RECOGNITION OF THE BAD FAITH CAUSE OF ACTION VIOLATES LOYAL AMERICAN'S RIGHT TO EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. Introduction.

Under the varying interpretations by the Alabama Supreme Court has held that art. I, section 11 of the Ala- Alabama Constitution, the recognition of the tort of bad faith violates Loyal American's right to equal protection as guaranteed by the Fourteenth Amendment of the United States Constitution. In case after case, the Alabama Supreme Court applied to art. I, section 11 of the 1901 bama Constitution effected a "freezing" of the right to trial by jury as of 1901, the date of adoption of the last Alabama Constitution.

However, art. I, section 11 has now been construed as granting the Alabama Supreme Court the authority, through judicial case law, to recognize new causes of action—causes of action not recognized as of the 1901 Alabama Constitution and which certainly were not entitled to trial by jury as of 1901. At the same time, the Alabama Supreme Court has used art. I, section 11 to strike down numerous legislative enactments under the guise of protecting the right to trial by jury. Because of the inconsistent and arbitrary manner in which art. I, section 11 has been applied—the recognition of the tort of bad faith, a new cause of action which did not exist as of 1901—Loyal American has been denied equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution.

B. Alabama Supreme Court's analysis establishes that art. I, section 11 of the 1901 Alabama Constitution "froze" the rights of the people as they existed in 1901.

In 1974 in *Gilbreath v. Wallace*, 292 Ala. 267, 292 So. 2d 651 (Ala. 1974), the Alabama Supreme Court held that art. I, section 11 of the 1901 Alabama Constitution prevented the legislative, executive and judicial departments from burdening the right to trial by jury as it existed in 1901.

> The clause "forbid[s] the state through the legislative, judicial, or executive department—one and all—from ever burdening, disturbing, qualifying, or tampering with this right to the prejudice of the people" . . . Section 11 "freezes" the right to trial by jury as that right existed in 1901, the date of the ratification of our present Constitution.

Moore v. Mobile Infirmary Association, 592 So. 2d 156, 159 (Ala. 1991). The Court's rationale was based upon the proposition that the adoption of the 1901 Constitution "froze" the right to trial by jury as they existed at that time. *See Smith v. Schulte*, —— So. 2d ——, 1995 WL 491245 (Ala. August 18, 1995); *Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993); *Moore v. Mobile Infirmary Association*, 592 So. 2d 156 (Ala. 1991); and *Gilbreath v. Wallace*, 292 Ala. 267, 292 So. 2d 651 (1974).

In *Moore*, the Alabama Supreme Court held that a $400,000 cap on non-economic damages in a medical malpractice action violated the right to trial by jury as guaranteed by section 11 of art. I of the 1901 Constitution. The Court commented:

> It is not relevant, under a section 11 analysis, that the statute has not entirely abrogated the right to empanel a jury in this type of case. The relevant inquiry is whether the function of the jury has been impaired. Because the right to a jury trial 'as it existed at the time the Constitution of 1901 was adopted must continue inviolate,' the pertinent ques-

> tion is not 'whether [the right] still exists under the statute, but whether it still remains inviolate.' [citations omitted]. 'For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guaranties.' [citations omitted].

Because the statute at issue in *Moore* "interfered" with the jury's verdict by placing a cap on the amount to be awarded, the *Moore* Court held it placed an impermissible burden on the right to trial by jury as guaranteed by section 11 of the Alabama Constitution of 1901. On that basis, the Court found the statute unconstitutional.

The Alabama Supreme Court has again and again selectively relied upon this proposition to declare acts of the Legislature, the body of government entrusted by the State Constitution to enact laws for the people, unconstitutional. Interestingly, most, if not all, of the statutes the Alabama Supreme Court has seen fit to declare unconstitutional under art. I, section 11 of the 1901 Alabama Constitution involve the Alabama Legislature's 1987 efforts at tort reform. *See American Legion Post Number 57 v. Leahey*, —— So. 2d ——, 1996 WL 390622 (Ala. July 12, 1996) (declaring unconstitutional Ala. Code section 12-21-45, which modified common law collateral source rule in personal injury actions); *Smith v. Schulte*, —— So. 2d ——, 1995 WL 491245 (Ala., August 18, 1995) (declaring unconstitutional Ala. Code section 6-5-547, which limited recovery in medical malpractice or medical wrongful death actions to $1,000,000); *Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993) (declaring unconstitutional Ala. Code section 6-11-21, which limited punitive damage awards to $250,000 unless act shown to be a part of pattern and practice of misconduct, or act shown to involve actual malice, slander, libel or defamation); and *Moore v. Mobile Infirmary Association*, 592 So. 2d 156 (Ala. 1992) (declaring unconstitutional Ala. Code section 6-5-544(b), which limited non-economic damages in medical malpractice action to

$400,000); *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414 (Ala. 1991) (declaring unconstitutional Ala. Code section 6-11-23(a), section 6-11-24(a), and a portion of the final sentence of section 6-11-23(b); the Court found these statutes improperly removed the presumption of correctness attached to a jury's award of punitive damages for purposes of post-trial and appellate review of those damages); *Clark v. Container Corp. Of America*, 589 So. 2d 184 (Ala. 1991) (declaring unconstitutional statute allowing periodic payment of future damages) (hereinafter collectively referred to as the "tort reform" cases).

In each of these cases, the Alabama Supreme Court relied upon the "inviolate" fundamental right of the people as established in 1901—because the jury did not have limitations or caps placed on its awards in 1901, the Alabama Legislature was not entitled to place limitations on those awards now. The underlying rationale of each of these cases was that *any modification* of the rights of the people as they existed in 1901 was unconstitutional under art. I, section 11 of the Alabama Constitution.

As this Court recognized in *Moore*, section 11's prohibition on interference with the right to jury trial is not limited to the legislative and executive departments of the State. *Moore*, 592 So. 2d at 159 (The clause "forbid[s] the state through the legislative, judicial, or executive department—one and all—from ever burdening, disturbing, qualifying, or tampering with this right to the prejudice of the people"). The same prohibition prevents the Alabama judiciary from "ever burdening, disturbing, qualifying, or tampering with this right to the prejudice of the people." *Id.*

However, the Alabama Supreme Court has interpreted the limitations placed on the judiciary under art. I, section 11 differently than the limitations placed on the legislature by section 11. For example, over the last twenty years, the Alabama Supreme Court has created multiple

new causes of action—the Alabama Extended Manufacturers Liability Doctrine, the tort of outrageous conduct, the tort of intentional interference with business or contractual relations, and at issue in this petition, the tort of bad faith—despite the fact that such causes of action were not in existence as of 1901. Additionally, through "judicial law," the Alabama Supreme Court has greatly altered a defendant's rights during litigation and on appeal.[2] How these modifications are valid, constitutional exercises of *judicial* authority while attempts by the Legislature to cap damages and to address other societal problems constitute a violation of art. I, section 11 is unclear and gives rise to the crux of Petitioner's equal protection argument.

C. The recognition of the tort of bad faith in 1981 was unconstitutional under art. I, section 11, because such a tort was not recognized as of 1901.

At the time of the adoption of the Alabama Constitution in 1901, there was no cause of action for bad faith either through statute or common law. This Court, by judicial fiat, created the tort of bad faith with its decision in *Chavers v. National Security Fire & Casualty Co.*, 405 So. 2d 1 (Ala. 1981) as recently as 1981. In *Chavers*, the Court defined the tort of bad faith as follows:

> Every contract contains an implied in law covenant of good faith and fair dealing; this covenant provides that neither party will interfere with the rights of the other to receive the benefits of this agreement. [citations omitted]. Breach of the covenant provides the injured party with a tort action for 'bad faith' notwithstanding that the acts complained of may also constitute a breach of contract. [citations omitted].

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[2] See Appendix B, listing recent decisions of the Alabama Supreme Court since 1975 which have negatively impacted upon the defendant's rights during litigation.

Chavers, 405 So. 2d at 4.[3] Accordingly, at the time the right to trial by jury was "frozen", an Alabama insurer such as Loyal American was not subjected to a bad faith claim for personal injury, inconvenience, annoyance, mental anguish or suffering and/or punitive damages arising out of the failure to pay benefits under an insurance policy. *See Vincent v. Blue Cross & Blue Shield of Ala.*, 373 So. 2d 1054, 1056 (Ala. 1979); *Stead v. Blue Cross & Blue Shield of Ala.*, 346 So. 2d 1140, 1141 (Ala. 1977). Importantly, the Alabama Supreme Court granted plaintiffs the right to a jury trial in all bad faith actions despite the fact that none existed as of 1901 since the cause of action itself did not exist.

When reviewed under the rigid confines of the Alabama Court's interpretation of art. I, section 11, it is clear that the recognition of the newly created tort of bad faith "burdens, disturbs, qualifies or tampers" with the right to a trial by jury as "frozen" by the Alabama Constitution of 1901. If the Alabama Legislature's efforts to enact certain limitations on damage awards or evidentiary matters is an improper tampering with the right to jury trial, the Alabama Supreme Court's actions in creating new causes of action and granting a right to trial by jury where none existed in 1901 clearly violates that provision as well.

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[3] The definition of the tort of bad faith is important because as evident from the definition quoted by the Alabama Court, the duty of good faith and fair dealing run to both sides of the contract. Accordingly, the insurer should also be entitled to good faith and fair dealing from the insured. However, since the recognition of the tort of bad faith, not one bad faith action against the insured has been recognized and Alabama has made no provision for such a cause of action. In fact, Petitioner Loyal American argued at trial and on appeal to the Alabama Supreme Court that because of the insured's bad faith misrepresentations on the application, Loyal American was justified, under Ala. Code § 27-14-7, in denying the claim presented by plaintiff. However, this argument was rejected. *See Loyal American Ins. Co. v. Mattiace*, —— So. 2d ——, 1996 WL 275242 at 4-8 (Ala., May 24, 1996).

D. The "warp and woof" of the common law do not authorize the Judiciary to do what the Legislature cannot.

The Alabama Supreme Court has rejected the claim that it inconsistently applies the right to trial by jury and that it is exercising legislative authority while refusing to acknowledge the Legislature's lawmaking authority. *See Loyal American Insurance Company v. Mattiace*, —— So. 2d ——, 1996 WL 275242 (Ala., May 24, 1996) (citing Court to the contrary results reached in tort reform decisions cited, *supra*).[4] The Alabama Supreme Court has rejected such arguments, concluding that it may properly create new causes of action, regardless of the fact that such causes of action did not exist as of 1901. The Alabama Supreme Court has stated:

> Judicially created causes of action, such as the Alabama Extended Manufacturer's Liability Doctrine, bad faith failure to pay an insurance claim, or willful violations of § 339 [of Restatement (Second) of Torts] are part of the warp and woof of the common law and are, therefore, inherently within 'those classes of cases in which the right [to a trial by jury as guaranteed by § 11] existed at common law.' [citations omitted].

Loyal American Insurance Co. v. Mattiace, —— So. 2d ——, 1996 WL 275242 (Ala., May 24, 1996) (quoting

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[4] *See also Smith v. Schulte*, —— So. 2d ——, 1995 Ala. Lexis 350 (Ala., August 18, 1995) (citing Court to statutory limitations placed on damages recoverable from governmental entities); *Moore v. Mobile Infirmary Association*, 592 So. 2d 156, 164-65 (Ala. 1991) (citing Court to statutory immunity for coemployees from damages for negligence and wantonness, statutory immunity for motor vehicle operators from liability for negligent injury to guest passengers, immunity for pollution control authorities from tort liability, etc.). Defendants in these actions noted that the referenced statutes had not been invalidated as unconstitutional and that, by analogy, the tort reform statutes at issue in these cases did not violate section 11 as well. These arguments were rejected by the Alabama Supreme Court.

Henderson v. Alabama Power Co., 627 So. 2d 878, 884-85 (Ala. 1993)).

Accordingly, the Alabama Supreme Court interprets art. I, section 11, of the Alabama Constitution as authorizing the Court to create new causes of action as it sees fit and subject only to the imaginary limitations of the "warp and woof" of the common law, despite the fact that such causes of action did not exist as of 1901. However, according to the Alabama Court, the same constitutional provision steadfastly prohibits the Alabama Legislature from enacting legislation that may be construed, no matter how remotely, as interfering with the right to a jury trial, whether through legislative caps or damages,[5] modification to evidentiary matters,[6] changes in the presumption of correctness to be attached to a jury award,[7] or through adjustments to the manner in which damages as awarded by the jury are actually paid.[8]

E. If art. I, section 11 of the 1901 Alabama Constitution prohibits the Alabama Legislature from limiting jury awards, such constitutional limitations also apply to the judiciary.

Although under the Alabama Court's analysis, the Alabama Legislature is not authorized to limit or remit the amount of civil penalties imposed on civil defendants, the Alabama Court reserves this right to itself. In *Henderson v. Alabama Power Company*, the Alabama Court struck down the statutory limits placed on awards of punitive

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[5] *See Smith v. Schulte*, —— So. 2d ——, 1995 Ala. Lexis 350 (Ala., August 18, 1995); *Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993); *Moore v. Mobile Infirmary Association*, 592 So. 2d 156 (Ala. 1992).

[6] *See American Legion Post No. 57 v. Leahey*, —— So. 2d ——, 1996 WL 390622 (Ala., July 12, 1996).

[7] *See Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414 (Ala. 1991).

[8] *See Clark v. Container Corp.*, 589 So. 2d 184 (Ala. 1991).

damages, as usurping the jury's function and violating the right to trial by jury. Continuing, the Alabama Court added:

> This Court, in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (1986), and *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989), articulated, clarified, and refined the common law mechanism of remittitur, so as to protect defendants on a case by case basis from verdicts so excessive or out of proportion to the wrong or to the individual defendant as to violate the defendant's right not to be deprived of property without due process of law.

Henderson, 627 So. 2d at 893. Thus, what the Alabama Constitution allegedly forbids the legislative body from doing by statutory enactment, the Alabama Supreme Court claims for its own. As vigorously stated by Justice Maddox's opinion in *Henderson*, concurring in part and dissenting in part, "[m]y colleagues [on the Court], in allowing for the recovery against this defendant of punitive damages in excess of the maximum amount fixed by the legislature, have implicitly held that the judicial branch of government is the only branch that can determine what constitutes a civil wrong and the recoverable damages for that wrong." *Henderson*, 627 So. 2d at 896-97 (Maddox, J., dissenting as to majority's conclusion that legislative cap on punitive damages was unconstitutional). *See also Smith v. Schulte*, —— So. 2d ——, 1995 WL 743580 (Ala., December 15, 1995) (Hooper, C. J., dissenting from order overruling the application for rehearing) (commenting upon inconsistency of Court's striking down legislative limits on punitive damages as unurping jury's function but, immediately thereafter, remitting the award under its own authority).

As evident from the above, the Alabama Supreme Court has inconsistently interpreted and applied art. I, section 11 of the 1901 Alabama Constitution. Additionally, in its interpretation, the Alabama Court totally ignores the separation of powers doctrine as established

in sections 42 and 43 of the 1901 Alabama Constitution.[9] As a result, the Alabama Supreme Court has denied Loyal

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[9] The Alabama Constitution states as follows:

> § 42. Legislative, executive and judicial departments established.
>
> The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.
>
> § 43. Separation of powers.
>
> In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative or judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.

The Alabama Supreme Court stated long ago:

> Speaking broadly, the Legislature of Alabama possesses all the legislative power which, under the federal Constitution, resides in the state, except where that power has expressly or impliedly been taken from it by the Constitution of the state.

State ex rel. Wilkinson v. Lane, 181 Ala. 646, So. 31 (1913). Throughout the years it has continued to hold that " 'So long as no constitutional limitations are exceeded, the Legislature is of supreme authority, and the courts, as well as all others, must obey.' " *Champion v. McLean*, 266 Ala. 103 at 118, 95 So. 2d 82 (1957), quoting *State v. Birmingham So. Ry.*, 182 Ala. 475, 479, 62 So. 77, 79 (1913). "The only power of [Alabama Supreme] [C]ourt is to declare the law as enacted by the [legislature]." *Champion v. McLean*, 266 Ala. at 117-18, 95 So. 2d at 97.

Only when the Legislature enacts a law that, beyond a reasonable doubt, violates the Alabama Constitution may the Judiciary strike it down. The very foundations of Alabama jurisprudence hold that no judgment of this Supreme Court can reverse or interfere with the Legislature so long as the Legislature acts within its constitutional limits. *Ex parte Screws*, 49 Ala. 57 at 65 (1873). It is not the responsibility of the Judiciary to substitute its judgment for that of the Legislature regarding a particular law. Instead, "the legislature's power is plenary [and] [t]he Courts cannot look to

American equal protection of the laws of the State of Alabama.

F. Upholding legislative limitations on the jury in criminal sentencing while striking down any legislative modifications to the jury's authority in civil actions is arbitrary and inconsistent.

Also indicative of the inconsistent manner in which the Alabama Supreme Court interprets and applies art. I, section 11 of the Alabama Constitution are the cases involving sentencing of a criminal defendant. As of 1901, the jury alone, not the judge, sentenced criminal defendants in cases involving murder in the first and second degree; manslaughter, rape, robbery and numerous other offenses. *See Henderson v. Alabama Power Co.*, 627 So. 2d 878, 905-06 (Ala. 1993) (Houston, J., dissenting). Additionally, in 1901, the jury was empowered to fix and determine the amount of the fine a convicted felon was to pay. *Id.*

However, in 1977, the Legislature enacted section 1205 of Act No. 607 (now codified at Ala. Code 1975, §§ 13A-5-1 through 13A-5-59), in which it removed from the jury the right to determine criminal sentences and the right to fix and determine the amount of fines. *Id.* Thus, if as the Alabama Supreme Court has continuously held

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the wisdom or folly, the advantages or disadvantages, of the [legislative action]." *Opinion of the Justices No. 265*, 381 So. 2d 183 at 185 (1980). This Court has also stated:

> The judicial branch of government was not intended to be and will not presume to act as a super agency to control, revise, modify or set at naught the lawful acts of administrative agencies. It is under restraint (§ 43, Constitution 1901) [sic] from imposing its methods or substituting its judgment for that of the [other] branches of the government.

Finch v. State, 271 Ala. 499, 504, 124 So. 2d 825, 830 (1960). Judicial overreaching defeats the requirement that we have a "government of laws and not of men." Ala. Const. 1901, § 43. Laws that do not violate the fundamental law are those of the people, whose Constitution requires obedience by all three branches.

in the tort reform cases, art. I, section 11 of the Alabama Constitution "froze" the right to a trial by jury as it existed in 1901, the Legislature's 1977 modifications to the procedure for the sentencing of criminal defendants constituted an improper tampering with the right to trial by jury in violation of art. I, section 11 of the Alabama Constitution.

However, in *Ex parte Giles*, a majority of the Alabama Supreme Court stated "[w]e reaffirm the principle that, in Alabama, the 'judge, and not the jury, is the final sentencing authority in criminal proceedings.'" *Ex parte Giles*, 632 So. 2d 577, 583 (Ala. 1993).[10] If, as the Alabama Supreme Court held in the tort reform cases cited, *supra*, art. I, section 11 divested the legislature of the right to set damage awards because that was the jury's function in 1901, then by the same reasoning, art. I, section 11 divested the legislature of the power to sentence criminals because that too was the function of the jury in 1901. *See Smith v. Schulte*, —— So. 2d ——, 1995 Ala. Lexis 350, *61-62 (Ala., August 18, 1995) (Maddox, J., dissenting); *Henderson v. Alabama Power Co.*, 627 So. 2d 878, 905 (Ala. 1993) (Houston, J., dissenting). *See also Ex parte Jackson*, 672 So. 2d 810 (Ala. 1995) (Houston, J., concurring in result).

As evident from these cited examples, the Alabama Supreme Court has again and again arbitrarily and inconsistently applied art. I, section 11 of the 1901 Alabama Constitution. These inconsistencies combine to deny Loyal American equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution. In addition, the statement made in *Henderson v. Alabama Power Co., supra*, that the Alabama Supreme

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[10] There can be no dispute that the same rights guaranteed by art. I, section 11 apply to civil as well as criminal actions. *See Gilbreath v. Wallace*, 292 Ala. 267, —— 292 So. 2d 651, 655 (1974) ("In Alabama the basic principles which apply to constitutional juries in criminal cases also apply in civil cases.")

Court is empowered, through the "warp and woof" of the common law, to change the rights of the people as those rights existed in 1901, is in direct contradiction to the Alabama Supreme Court's holdings under art. I, section 11. As recognized by Alabama Supreme Court Justice Houston, in his concurrence in *Ex parte Jackson*:

> The majority of [the Alabama Supreme Court] has made Art. I, section 11, of the Alabama Constitution its plaything. It can restrict § 11 so as to permit the legislature, after the ratification of the 1901 Constitution, to impose a $100,000 maximum amount of damages that can be recovered by an individual in a tort action against a governmental entity, when there was no such limitation on tort damages before the ratification of the 1901 Constitution (*see Garner v. Covington County*, 624 So. 2d 1346 (Ala. 1993)); it can broaden § 11 wide enough to strike down a $250,000 cap on punitive damages (*Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993)); it can shrink § 11 small enough to be able to affirm a court's, as opposed to a jury's, sentence to death, even though sentencing to death was a jury's function when the 1901 Constitution was ratified (*see Ex parte Giles*, 632 So. 2d 577 (Ala. 1993)); it can aagin broaden § 11 wide enough to strike down a $1,000,000 cap on a wrongful death recovery in a medical malpractice action (*Smith v. Schulte, supra*); and today it shrinks § 11 so small that it can ignore it ("the jury returned an advisory verdict, by recommending a sentence of life imprisonment, without parole," 671 So. 2d at 1367) and affirm Jackson's death sentence. I dissented in *Henderson v. Alabama Power Co.* and in *Smith v. Schulte*. I concurred in the result in *Ex parte Giles*. I concur in the result in this case, because I believe the legislature had the power to impose caps on punitive damages and to fix the method of punishment for crime [citations omitted]. I regret that the abolition of caps on punitive damages was such a felt necessity of the times that the majority of this Court played

> a sleight-of hand trick to justify striking these caps, while trying not to have to declare unconstitutional much of Chapter 5 of Title 13A of the Code (Ala. Code 1975, §§ 13A-5-1 through 13A-5-59), "Punishments and Sentences."
>
> I am convinced that *Henderson v. Alabama Power Co.* and *Smith v. Schulte* were wrongly decided. If there is a due process or equal protection violation as a result of this waffling by the majority, it would be the civil defendants whose property was taken in excess of legislatively mandated amounts who would have a right to have that violation redressed, not the criminal defendants whose punishment has been legally prescribed by legislation.

Ex parte Jackson, 672 So. 2d 810, 812-13 (Ala. 1995) (Houston, J., concurring). Clearly, the Alabama Supreme Court has not applied art. I, section 11 fairly and evenly to plaintiffs and defendants, insureds and insurers, and to civil and criminal litigants in the State of Alabama. Accordingly, Petitioner's right to equal protection as a defendant, as an insurer and as a civil litigant, mandates that the tort of bad faith be declared unconstitutional in the State of Alabama.

CONCLUSION

Equal protection of the law mandates a decision that Alabama's bad faith law violates section 11. The equal protection guarantees of the Fourteenth Amendment and the Alabama Constitution in conjunction therewith prevent the application of the law in a fashion that favors plaintiffs and discriminates against defendants. If, as the Alabama Supreme Court has held, section 11 "freezes" the rights as of the adoption of the 1901 Constitution, equal protection requires this Court to declare the law of "bad faith" in Alabama unconstitutional.

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME COURT OF ALABAMA

No. 1941777

LOYAL AMERICAN LIFE
INSURANCE COMPANY, INC.

v.

SUE M. MATTIACE

May 24, 1996

Appeal from Lauderdale Circuit Court (CV-91-315)

PER CURIAM.

The defendant, Loyal American Life Insurance Company, Inc., appeals from a judgment entered on a jury verdict in favor of the plaintiff, Sue M. Mattiace. The jury found that Loyal American had breached a life insurance contract and had acted in bad faith by failing to pay the insurance claim submitted by Sue Mattiace. We affirm.

I. Facts

In February 1990, Joseph F. Mattiace, who was then age 32, met with one of Loyal American's agents and applied for a life insurance policy with a face value of $32,200. As a part of the process, the agent asked Joseph a set of questions listed on the application form and recorded his answers. One of the questions asked was: "To

the best of your knowledge and belief, has . . . any person on whom insurance is applied for in this application: . . . [w]ithin the past 5 years been arrested or convicted for the use of, or driving under the influence of alcohol or drugs? (if yes, give driver's license number and details.)" Joseph's answer to that question was recorded by the agent as "no."

Loyal American's agent, at that meeting with Joseph, reviewed Joseph's application and approved the policy as "standard," meaning that Joseph would pay the standard rate of premiums. The policy was issued with a $32,200 face value, and Joseph's mother, Sue Mattiace, was the beneficiary. The first yearly premium was paid to Loyal American by a loan from Joseph's credit union.

On March 2, 1990, Joseph was killed in an automobile accident. Blood and urine tests indicated that Joseph was legally intoxicated at the time of his death. Loyal American was notified of Joseph's death on March 12. Thereafter, it issued a check to Joseph's credit union for the amount of the unearned premium on the policy.

Sue Mattiace made a claim on Joseph's life insurance policy in August 1990. Loyal American responded by stating that because Joseph had died within two years of the policy's issue date, it would conduct an investigation to determine the truthfulness of his answers on the application form. As a part of the investigation, Loyal American obtain a "motor vehicle report" on Joseph, which revealed that he had been convicted of DUI on June 14, 1989, approximately eight months before he applied for the life insurance policy. Loyal American informed Sue Mattiace that it was rescinding Joseph's life insurance policy, based on his DUI conviction. It also informed her that it was denying her claim for policy benefits.

In response, Sue Mattiace's attorney contacted Loyal American's vice president of claims, George Lyles, and sought an explanation of Loyal American's underwriting

practices that would justify the denial of her claim. On January 22, 1991, Lyles wrote a letter to Sue Mattiace's attorney, stating:

> "Pursuant to our telephone conversation yesterday, I am enclosing a page from our underwriting manual which shows that we would have charged an extra premium of $3.00 per $1,000.00 of insurance for the first three years of the contract had we known about his previous driving record. Since we would not have issued the policy at the premium rate as applied for, it was proper that the policy be rescinded [based on Ala.Code.1975, § 27-14-7]."

(Emphasis added.) However, it is uncontested that the page enclosed with the "Lyles letter" was not a page from a Loyal American underwriting manual. Loyal American does not have its own underwriting manual. Instead, it utilizes numerous underwriting manuals prepared by various reinsurance companies and relies upon "subjective underwriting" based on its underwriters' background and knowledge.

The page enclosed with the "Lyles letter" was actually a page from the underwriting manual of a reinsurance company, one referred to in the record simply as "Cologne." However, the "Cologne" page did not support Loyal American's position that it would have charged Joseph a higher premium. The "Cologne" page actually indicated that for a person age 26 or over, such as Joseph, a DUI conviction within a year of the policy application would not have caused a rate increase but, rather, would have caused the policy to be issued at the standard rate.

In May 1991, Sue Mattiace sued Loyal American, alleging breach of contract and the tort of bad faith. The complaint was later amended to add a third count alleging fraud, misrepresentation, and deceit. Loyal American moved for a summary judgment, which the trial court denied. Before trial, each party filed a motion in limine to exclude certain evidence. The trial court denied Loyal

American's motion in limine, but granted Sue Mattiace's motion in limine.

The case went to trial in May 1995. After resting her case, Sue Mattiace voluntarily dismissed the fraud, misrepresentation, and deceit claims. Loyal American moved for a directed verdict, which the court denied. The jury returned a verdict in favor of Sue Mattiace, awarding her $32,200 on her breach of contract claim, plus $25,000 compensatory damages for emotional distress and $75,000 punitive damages on her had faith claim. Loyal American then moved for a judgment notwithstanding the verdict or, in the alternative, a new trial or a remittitur. The trial court denied that motion. Loyal American appealed.

II. Issues

Although Loyal American appears to argue several issues on appeal, the issues may be summarized as follows: (1) whether the trial court erred in ruling on either party's motion in limine, (2) whether the trial court erred in denying Loyal American's motions for a directed verdict and a J.N.O.V. on the breach of contract and bad faith claims, and (3) whether recognition of the bad faith cause of action violates Loyal American's right to a trial by jury under the Alabama Constitution of 1901 or its right to equal protection of the laws guaranteed by the Alabama and United States Constitutions.

III. Motions in Limine

A. The "Cologne" Page

Loyal American argues that the trial court erred by denying its motion in limine to exclude the "Cologne" underwriting manual page from evidence. As noted previously, the "Cologne" page was mailed by Loyal American to Sue Mattiace's lawyer as an attachment to the "Lyles letter" explaining why it had rescinded Joseph's life insurance policy. Citing Nationwide Mut. Ins. Co. v. Clay, 525 So.2d 1339 (Ala. 1987), cert. denied, 488 U.S.

1040 (1989), and other cases, Loyal American notes that under Alabama law, the issue whether an insurance company acted in bad faith in handling a claim must be judged solely by the information that was before the insurer when it denied the claim and that any information obtained after the denial is not relevant to the bad faith claim.

Loyal American contends that the "Cologne" page was not before it when it decided to rescind Joseph's policy. It says that its underwriting department uses a "Hudson" reinsurance manual to determine the effect of DUI convictions on life insurance applications and that its attachment of the "Cologne" page to the "Lyles letter" was simply a harmless mistake. Loyal American argues that the "Cologne" page should not have been admitted into evidence because, it says, the page was irrelevant and immaterial because, it says, (1) it did not rely on that page in denying the claim, (2) that page was not applicable, and (3) that page did not become an issue until after the claim had been denied.

In response, Sue Mattiace argues that the trial court did not err in admitting the "Cologne" page into evidence because, she says, (1) the "Lyles letter" to which it was attached indicates that it was used by Loyal American during the process of denying her claim, and (2) it was extremely relevant to demonstrate that "underwriting at Loyal American [becomes] firm and restrictive only after a claim [is] filed."

"A trial court has great discretion in determining the admissibility of evidence, and its rulings will not be reversed on appeal absent an abuse of discretion." Grayson v. Dungan, 628 So.2d 445, 447 (Ala.1993). We find no abuse of discretion in the trial court's denial of Loyal American's motion in limine to exclude the "Cologne" page from evidence. Although Loyal American argues that the "Cologne" page was not before it when it decided to rescind Joseph's policy and deny the

claim, the letter written by its own vice president of claims indicates the exact opposite, that the page was the basis for denying the claim. Accordingly, we believe that the "Colonge" page was highly relevant to the issues raised by Sue Mattiace's breach of contract and bad faith claims, and we conclude that it was a question of fact for the jury to determine whether the page was sent mistakenly, as Loyal American now contends.

B. Evidence of Intoxication at the Time of Death

Loyal American also argues that the trial court erred by granting Sue Mattiace's motion in limine to exclude the evidence it wished to admit to show that Joseph was legally intoxicated at the time of his fatal automobile accident. It contends that Joseph's intoxication was relevant to show the materiality of his misrepresentation on the life insurance policy applications—that he had not had a DUI conviction within the preceding five years. Loyal American states that if Joseph had answered the question truthfully, then, unless there were extenuating circumstances, the use of its "Hudson" underwriting manual would have caused it to not issue the insurance policy to him at the standard rate but to make him a counteroffer of the same coverage at a higher rate or of less coverage at the same rate.

In response, Sue Mattiace argues that the trial court did not err by excluding the evidence that Joseph was intoxicated at the time of his death. She notes that the case did not involve any issue relating to Joseph's manner of death; rather, the case involved the issues whether Joseph's misrepresentation regarding the DUI conviction was material to the issuance of the insurance policy and whether Loyal American's refusal to pay the benefits of the policy was an act of bad faith. She says that three of Loyal American's own witnesses stated that the manner of Joseph's death was immaterial to the issue whether the claim should have been paid. She notes that Loyal American had rescinded another insured's policy for fail-

ing to disclose a prior DUI conviction, even though that person's cause of death was a stabbing. She argues that Loyal American would have claimed that the failure to disclose the prior DUI conviction was a material misrepresentation, even if Joseph had died of a heart attack or a stroke, and that the fact that he died in an automobile accident while legally intoxicated would simply have prejudiced the jury with irrelevant, immaterial facts.

In ruling on Sue Mattiace's motion in limine to exclude the evidence of Joseph's intoxication at the time of his death, the trial court stated:

> "I've always thought it was unusual that the material misrepresentation, if there be one, can avoid the coverage even though the death or the loss is attributable to a totally unrelated cause. So, I think the converse would not be true that you could prove materiality because the death or the damage or the injury was occasioned by the condition which was misrepresented."

As noted above, we will not reverse a trial court's ruling on the admissibility of evidence unless its ruling was an abuse of discretion. Grayson, supra. We conclude that the court did not err in excluding the evidence at issue. It is clear from the record before us that whether Joseph was intoxicated at the time of his death was not relevant to the critical issue of this case—whether it was Loyal American's standard procedure not to issue a life insurance policy at a standard rate where the applicant had had a DUI conviction in the prior year.

IV. Directed Verdict Motion

We must next determine whether the trial court erred in denying Loyal American's motion for a directed verdict on Sue Mattiace's breach of contract and bad faith claims. In Bussey v. John Deere Co., 531 So.2d 860, 863 (Ala.1988), this Court stated:

> "The standard of review applicable to a motion for directed verdict or judgment notwithstanding the verdict is identical to the standard used by the trial court in granting or denying the motions initially. Thus, when reviewing the trial court's ruling on either motion, we determine whether there was sufficient evidence to produce a conflict warranting jury consideration. And, like the trial court, we must view any evidence most favorably to the nonmovant."

(Citations omitted.)

A. Breach of Contract

Viewing the evidence in a light most favorable to Sue Mattiace, the nonmovant as to Loyal American's motions for a directed verdict and a J.N.O.V., we must determine whether Sue Mattiace presented sufficient evidence in support of her breach of contract claim to produce a conflict warranting jury determination. It is uncontested that a contract of life insurance existed between Loyal American and Joseph Mattiace. Sue Mattiace argues that the insurance contract was breached by Loyal American's failure to pay her the policy benefits upon Joseph's death. Loyal American argues that it did not breach the contract, because, it says, it was acting within its legal rights in rescinding the contract and denying her claim for benefits based on Joseph's misrepresentation that he had not had a DUI conviction in the preceding five years.

Loyal American notes that the concept of good faith and fair dealing implied in every contract runs to both parties of an insurance contract, both the insurer and the insured. It argues that Joseph acted in bad faith by failing to disclose his DUI conviction when he applied for the insurance.

The legislature has recognized the nature of the relationship between an insurer and an insured by enacting Ala.Code 1975, § 27-14-7. That section states:

> "(a) All statements and descriptions in any application for an insurance policy . . . shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy or contract unless either:
> ". . . .
> "(2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or
> "(3) The insurer in good faith would either not have issued the policy or contract, or would not have issued a policy or contract at the premium rate as applied for . . . ."

(Emphasis added.)

Given the effect of § 27-14-7, we must determine whether there was at least a question of fact warranting a jury determination on whether Loyal American acted within its legal rights when it rescinded Joseph's insurance policy and refused to pay Sue Mattiace's claim for policy benefits. In other words, was Loyal American entitled to rescind Joseph's policy, as a matter of law?

We believe not. Sue Mattiace presented substantial evidence, which is discussed in detail below, that Loyal American's underwriting department does not have its own underwriting manual and does not follow a set of standards that are binding on its underwriters, but instead follows a practice of subjective underwriting whereby each individual underwriter makes decisions based on personal experience. These facts warrant a jury's determination whether Loyal American breached its insurance contract. Accordingly, the trial court properly denied Loyal American's motions for a directed verdict and a J.N.O.V. as to Sue Mattiace's breach of contract claim.[1]

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[1] We comment below on the issue whether Sue Mattiace presented evidence warranting a directed verdict in her favor on her breach of contract claim.

B. Bad Faith

The elements of an action against an insurance company for bad faith refusal to pay a claim are:

> "(a) an insurance contract between the parties and a breach thereof by the defendant;
>
> "(b) an intentional refusal ot pay the insured's claim;
>
> "(c) the absence of any reasonably legitimate or arguable reason for that refusal . . . ;
>
> "(d) the insurer's actual knowledge of the absence of any legitimate or arguable reason;
>
> "(e) if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim."

National Security Fire & Cas. Co. v. Bowen, 417 So.2d 179, 183 (Ala.1982). See Miller v. Preferred Risk Mut. Ins. Co., 572 So.2d 1260 (Ala.1990) (citing Chavers v. National Security Fire & Cas. Co., 405 So.2d 1 (Ala. 1981), and see Metmor Financial, Inc. v. Commonwealth Land Title Ins. Co., 645 So.2d 295 (Ala.1993). In bad faith cases involving an insurer's refusal to pay a claim on a policy, this Court has established the "directed verdict on the contract claim" standard.[2] In National Sav-

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[2] This test is not applicable to every bad faith claim. Even if an insured is not entitled to a directed verdict on the contract claim, the bad faith claim can be submitted to the jury if the insurer recklessly or intentionally fails to properly investigate a claim or subject the results of the investigation to a cognitive evaluation and review. Blackburn v. Fidelity & Deposit Co. of Maryland, 667 So.2d 661 (Ala. 1995); Thomas v. Principal Financial Group, 566 So.2d 735 (Ala.1990). Further, the trial court need not expressly direct a verdict in favor of the plaintiff on a breach of contract claim in order to submit a bad faith claim to the jury. The trial court must simply determine that the plaintiff has met the standard of proof required for a directed verdict.

ings Life Ins. Co. v. Dutton, 419 So.2d 1357, 1362 (Ala. 1982), this Court stated:

> "In the normal case in order for a plaintiff to make out a prima facie case of bad faith refusal to pay an insurance claim, the proof offered must show that the plaintiff is entitled to a directed verdict on the contract claim and, thus, entitled to recover on the contract claim as a matter of law. Ordinarily, if the evidence produced by either side creates a fact issue with regard to the validity of the claim and, thus, the legitimacy of the denial thereof, the tort claim must fail and should not be submitted to the jury."

(Emphasis added.) Following the rule of Dutton, in order to decide whether the trial court erred in denying a directed verdict in favor of Loyal American on the bad faith claim, we must determine whether Sue Mattiace met her burden of proving that she was entitled to a directed verdict on the contract claim.

Thus, a critical issue is whether Loyal American was legally entitled to rescind Joseph's policy based on his failure to inform Loyal American of his DUI conviction. If Loyal American's actions were justified under § 27-14-7, then Sue Mattiace did not meet the "directed verdict on the contract claim" standard and her bad faith claim must also fail.

1.

Loyal American argues that Sue Mattiace failed to prove that she was entitled to a directed verdict on her contract claim and, thus, was not entitled to have her bad faith claim submitted to the jury. First, Loyal American contends that it proved at trial that it "followed a standard procedure of rating a policy if the insured had a DUI conviction within twelve months of the application unless there were extenuating circumstances" and "a DUI conviction was material to the risk underwritten"; these facts, it argues, allowed it to rescind Joseph's policy under § 27-14-7. Loyal American also argues that the mate-

riality of Joseph's misrepresentation was at least a question of fact for the jury and that the existence of a fact question precluded a directed verdict for Sue Mattiace on her breach of contract claim and, therefore, necessitated a directed verdict in its favor on the bad faith claim. Finally, Loyal American argues that because the question whether an insurer acted in bad faith by denying a claim must be judged by what was before the insurer at the time the denial was made, it says the "Lyles letter" and attached "Cologne" page, which was written two months after the claim had been denied, have no bearing on whether it acted in bad faith. In sum, Loyal American states that it had the right under § 27-14-7 to rescind the policy and thus had a legitimate reason for denying Sue Mattiace's claim for policy benefits.

In response, Sue Mattiace argues that she was entitled to a directed verdict on her breach of contract claim and, thus, that the trial court properly denied Loyal American's motion for a directed verdict on her bad faith claim. She contends that Loyal American did not have a legitimate reason for refusing to pay her claim for policy benefits because, she says, had it known of Joseph's DUI conviction when he applied for life insurance, it would not have rejected the application and would not even have rated the policy premiums differently. She argues that Loyal American's use of numerous underwriting manuals, where no particular manual was binding on a particular type of risk, created an atmosphere of underwriting that makes it impossible to determine whether a misrepresentation such as Joseph's, regarding a DUI conviction, was always considered to be a material misrepresentation. Sue Mattiace emphasizes that the "Cologne" page, which was sent to her attorney as being the underwriting standard that Loyal American used to rescind Joseph's policy and refuse her claim for benefits, does not support Loyal American's current position. Rather, she says, it supports her position that if Loyal American had known of Joseph's DUI conviction at the time of his application,

it would not have considered the conviction material to its underwriting risk and would have issued Joseph a policy at the standard premium. Thus, she argues, Loyal American's action did not fall within the protections of § 27-14-7, and, thus, that it breached the contract as a matter of law; thus, she argues, she met the "directed verdict on the contract claim" standard for her bad faith claim.

2.

The critical issue is whether Loyal American would have issued Joseph a life insurance policy at the standard premium if he had indicated on his application that he had been convicted of DUI within the preceding year. In other words, did it have a fixed procedure or binding rule whereby such a conviction within the preceding year always caused the policy premium to be increased? If it did have such a standard operating procedure, then Loyal American's rescission of Joseph's policy and its denial of the claim for benefits fall within the protection of § 24-14-7. Given the evidence of the loose and inconsistent manner in which Loyal American has operated its underwriting department, we conclude that it had no such standard procedure.[3]

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[3] The following is a sampling of testimony given by Loyal American employees or former employees:

"Q. Is there a sentence in Underwriting for an underwriter at Loyal American, is there a single written sentence at Loyal American in the Underwriting Department that is required as a basic foundation for underwriting?

"A. I don't think so."

"Q. When there's an applicant for a life insurance policy with Loyal American, what assurance is there that the applicant will get looked at up front in the underwriting process with the same consistency as anyone else?

"A. There's no guarantee. It's just, you know, one underwriter could have gotten ahold of it versus another, a different

Regarding Loyal American's motion for a directed verdict on the bad faith claim, the trial court commented:

> "I find the state of evidence and the testimony from company representatives to be at best confusing and at worst misleading. I was just looking here at the affidavit of Ms. Dollarhide [a Loyal American underwriter] in support of [the] motion for summary judgment where there is the unequivocal statement that 'Loyal American does not have an underwriting manual on which it relies in the underwriting process. There are available from insurers a number of guides which are used in the underwriting process. There is no particular guide or manual which is binding on

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market, a different product. I mean, we—it's just based on our knowledge and our experience as underwriters."

"Q. When you say 'continue underwriting the way we were' [you] have described the underwriting inside Loyal American to be subjective underwriting, correct?

"A. Correct.

"Q. That you, at Loyal American as an underwriter, Marilyn Wilkerson, Judy Herring, nobody was ever told there was any manual or guideline, whether it was Hudson, Cologne, Transamerica, there was nothing that was required to be followed, correct?

"A. Correct."

"Q. And you state there that 'Loyal American Insurance Company does not have an underwriting manual on which it relies in the underwriting process. There are available from insurers a number of guides which are used in the underwriting process. There is no particular guide or manual which is binding on the underwriters at Loyal American in writing a particular risk.' Correct?

"A. Correct.

"Q. And that was true, wasn't it?

"A. That is true."

"Q. And you have never been told by anyone at Loyal American that there's any particular guide that you are required to use as a foundation on any particular risk?

"A. I have never been told that I had to use one particular guide. Different ones have been recommended but I was never told that I had to use this one and that's it."

underwriters at Loyal American Life Insurance Company in underwriting a particular risk.'

"And, as I understand it, one of the primary evils complained of by the plaintiff is that claims process, if there is no lodestar, there is no polestar, there is no guiding star as a point of departure, then the potential for abuse, without assuming abuse in this case, becomes unlimited. It would be as if I had the Code of Alabama, the Code of Mississippi, the U.S. Code, and the Republic of Panama Code and when I was making a ruling, I'd pull whichever of those books off the shelf that I could make fit with my predisposition and predilection.

". . . .

"And let me say this about the Loyal American guideline, and I'm a little distressed that it hasn't been cleared up more clearly in the evidence, this business about whether your name is on the book or whether it has a red cover or a black cover, a lot of people use the holy writ for guidance in their daily lives but they don't have to have the Patterson Bible or the Carr Bible or the Whitten Bible written on it to be ready reference. Some Bibles have blue backs, some have red, and some have green. The critical question to me is whether a guidance prepared by whoever with whatever color cover and with x, y, or z on the front that were the guidelines which measured the underwriting and subsequently measured the claims process. Nobody has to—There's no particular formality with which those guidelines must be adopted, but they must be identified and utilized in [a] specific [way] so a person interested in the process either inter- or intracompany or persons who deal with the company could have reasonable notice as to the measure that was being used.

"It's akin to the old carnival trick of which shell is the pea under? You know, and the rube jumps

> at the wrong shell and he doesn't get the Browning shotgun."

(Emphasis added.)

We agree with the trial court that Loyal American's use of numerous, differing underwriting manuals and its emphasis on each underwriter's personal subjectivity created an atmosphere in which there was great opportunity for inconsistency, where dissimilar underwriting decisions were reached regarding similar policy applicants.

This conclusion alone, however, does not answer the question whether Sue Mattiace met the "directed verdict on the contract claim" standard necessary for her bad faith claim to be submitted to the jury. Regardless of evidence to the contrary, Loyal American insists that it proved it followed a standard procedure of using the "Hudson" underwriting manual rather than the "Cologne" manual to evaluate DUI risks for life insurance. Loyal American argues that there is at least conflicting evidence on that issue sufficient to warrant a jury decision on the contract claim and, thus, that Sue Mattiace did not meet the "directed verdict on the contract claim" standard.

In response to this argument by Loyal American, the trial court stated: "I think the case [law] is also clear that a defendant can't create its own fairly debatable reason. You know that is the Catch 22 in your argument." (Emphasis added.) We believe the trial court's comment indicates that for the purpose of determining whether Sue Mattiace met the "directed verdict on the contract claim" standard, given the abundant evidence of inconsistency in the underwriting process, the court did not allow Loyal American's after-the-fact promises that it solely relied on the "Hudson" manual to evaluate "driver criticisms" to create its legitimate, debatable reason for denying the claim for policy benefits.

In Blackburn v. Fidelity & Deposit Co. of Maryland, 667 So.2d 661, 669 (Ala.1995), we stated that "an insurer's subjective belief that a portion of its insurance

contract precludes coverage is not an absolute defense to a bad faith claim." We also stated that if an insurer's subjective interpretation of an insurance policy could create the fairly debatable reason needed to defend a bad faith claim, then insurers would be encouraged to write ambiguous insurance policies. Id.

Similarly, if an insurer is allowed to intentionally create an atmosphere in its underwriting department where no standards are binding on its underwriters and when a claim for policy benefits is received an underwriter can pull off a shelf underwriting standards that are stricter than those that were used when the policy was issued, then the insurer would be creating its own debatable reason for denying the claim. We cannot condone such action and let self-created uncertainty as to underwriting standards defeat a claim of bad faith where that uncertainty is the very basis of the allegation of bad faith. Thus, we hold that Loyal American cannot rely upon its chosen mtehod of "subjective underwriting" to create its own legitimate reason for denying a claim, and we conclude that Sue Mattiace presented substantial evidence in support of each element of an action for bad faith. The trial court properly denied Loyal American's motions for a directed verdict on Sue Mattiace's bad faith claim.

V. J.N.O.V. Motions

For the same reasons discussed in section IV, we hold that the trial court properly denied Loyal American's motions for J.N.O.V.

VI. Constitutionality of Allowing Bad Faith Claims

Loyal American argues that allowing the bad faith cause of action violates its right to jury trial, as that right is guaranteed by the Alabama Constitution of 1901, Art. I, § 11. Citing Smith v. Schulte, [Ms. 1930362, August 18, 1995] —— So.2d —— (Ala.1995); Henderson v. Alabama Power Co., 627 So.2d 878 (Ala.1993); Moore

v. Mobile Infirmary Association, 592 So.2d 156 (Ala. 1991); and Gilbreath v. Wallace, 292 Ala. 267, 292 So.2d 651 (1974), Loyal American states that this Court's opinions regarding the jury trial right have held that the adoption of the Alabama Constitution of 1901 "froze" the right to a trial by jury as it existed at that time. It argues that because no bad faith cause of action existed as of 1901, the recognition of such a cause of action by this Court in 1981 [4] was an unconstitutional tampering with the right to trial by jury as it was "frozen" in 1901. Thus, Loyal American contends that it is unconstitutional to allow actions based on the tort of bad faith.[5]

Loyal American also contends that any action by this Court that alters the jury trial right, in violation of § 11 of the Alabama Constitution of 1901, also violates its rights under the equal protection guarantees of the Alabama and United States Constitutions. It argues that the recognition of the tort of bad faith is a violation of its equal protection rights because, it says, allowing plaintiffs a legal cause of action to recover damages for such a wrong favors plaintiffs and unfairly discriminates against the defendant insurance companies.

A. Right to Trial by Jury

Section 11 of the Alabama Constitution of 1901 states: "[T]he right of trial by jury shall remain inviolate." As

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[4] This Court first recognized the tort of bad faith in Chavers v. National Security Fire & Casualty Co., 405 So.2d 1 (Ala.1981).

[5] Loyal American's argument would also question the constitutionality of allowing certain other common law causes of action, such as tortious interference with business relations (first recognized in Sparks v. McCrary, 156 Ala. 382, 47 So. 332 (1908)); tortious interference with contractual relations (first recognized in Tennessee Coal, Iron & Ry. v. Kelly, 163 Ala. 348, 50 So. 1008 1909)); the Alabama Extended Manufacturer's Liability Doctrine (first recognized in Casrell v. Altec Industries, Inc., 335 So.2d 128 (Ala.1976)); and outrageous conduct (first recognized in American Road Service Co. v. Inmon, 394 So.2d 361 (Ala.1980)).

noted by Loyal American, this Court has stated, albeit as dictum, that the Alabama Constitution "froze" the right to trial by jury as it existed in 1901. The Court has held: "It is well settled in Alabama that § 11 governs (1) those causes of action arising under the common law, and (2) those causes of action afforded by pre-1901 statutes." Smith v. Schulte, supra, —— So.2d at —— (emphasis omitted). Loyal American's argument that its right to trial by jury, as defined by § 11, is violated by this Court's recognition of the tort of bad faith, is not well taken.

There are several flaws in Loyal American's argument. First, at a basic level of legal understanding, Loyal American appears to confuse the right to a trial with the right to a trial by jury. Even if Loyal American's argument, that § 11 prevents a trial by jury for all "new" common law causes of action recognized after 1901, was correct (we hold it is not), § 11 would not make the cause of action itself unconstitutional—it would make a jury trial on that action unconstitutional. Such an interpretation of § 11 would not preclude a bench trial on the cause of action, a trial where the judge rather than a jury serves as factfinder. Thus, Loyal American's argument that allowing "new" common law causes of action (such as the tort of bad faith and those noted in footnote 5) is per se a violation of § 11 is without merit.

Moreover, it is clear that the right to a jury trial protected by § 11 applies to all common law causes of action, including the tort of bad faith. Common law causes of action are those in which legal rights are determined, as opposed to equitable rights. We have previously noted the following regarding § 11's application to common law cases:

> "This rule is merely a restatement of the principle declared in Thomas v. Bibb, 44 Ala. 721, 722 (1870): '[T]he right of trial by jury is confined to cases in which it was conferred by the common law,

> to suits which the common law recognized amongst its old and settled proceedings and suits, in which legal rights were to be ascertained and determined, in contradistinction to those in which equitable rights alone were recognized, and equitable remedies were administered, or in which was a mixture of law and equity.' (Emphasis added) (citing Story on Const. § 1763; Tims v. State, 26 Ala. 165 (1855); Boring v. Williams, 17 Ala. 510 (1850))."

Henderson, supra, 627 So.2d at 884. See Finance, Investment & Rediscount Co. v. Wells, 409 So.2d 1341 (Ala.1981). In Henderson, this Court specifically addressed the right to a trial by jury in a bad faith case:

> "Judicially created causes of action, such as the Alabama Extended Manufacturer's Liability Doctrine, bad faith failure to pay an insurance claim, or willful violations of § 339 [of Restatement (Second) of Torts] are part of the warp and woof of the common law and are, therefore, inherently within 'those classes of cases in which the right [to a trial by jury as guaranteed by § 11] existed at common law.' Gilbreath [v. Wallace], 292 Ala. 267, 270, 292 So.2d 651, 653 [(1974)] (emphasis added [in Henderson])."

627 So.2d at 884-85.

Accordingly, we hold that Loyal American's right to a trial by jury, as defined by § 11 of the Alabama Constitution of 1901, was not violated by this Court's recognition of the tort of bad faith.

B. Equal Protection

As noted above, Loyal American argues that allowing the tort of bad faith violates its equal protection guarantees under the Alabama Constitution of 1901 and under the Fourteenth Amendment to the United States Constitution. Loyal American refers this Court to a series of

cases holding that a plaintiff has no right to punitive damages; however, it cites no legal authority in support of its contention of unfair discrimination. " 'Where an appellant fails to cite any authority, we may affirm, for it is neither our duty nor [our] function to perform all the legal research for an appellant.' " Henderson v. Alabama A & M University, 483 So.2d 392 (Ala.1986) (quoting Gibson v. Nix, 460 So.2d 1346, 1347 (Ala.Civ.App.1984). See Ala.R.App.P. 28(a). Moreover, we find no merit in the argument.

VII. Conclusion

The judgment of the trial court is affirmed.

AFFIRMED.

SHORES, KENNEDY, COOK and BUTTS, JJ., concur.

HOUSTON, J., concurs in part and concurs in the result in part.

ALMON J., concurs in the result.

HOOPER, C.J., and MADDOX, J., dissent.

HOUSTON, JUSTICE (concurring in part and concurring in the result in part).

I concur except as to that portion of the opinion discussing the "Constitutionality of Allowing Bad Faith Claims" issue, and I concur in the result as to that issue.

HOOPER, CHIEF JUSTICE (dissenting).

In February 1990, Joseph F. Mattiace, who was then age 32, met with agents of Loyal American Life Insurance Company and applied for a life insurance policy with a face value of $32,200. As a part of the application process, one of the agents asked Joseph a set of questions listed on the application form and recorded his answers.

One of the questions asked whether he had been arrested or convicted for DUI in the past five years, and Joseph said "no."

On March 2, 1990, Joseph was killed in an automobile accident. Blood and urine tests indicated that Joseph was legally intoxicated at the time of his death. Sue Mattiace, the mother of Joseph and the beneficiary under the policy, made a claim on Joseph's life insurance policy in August 1990. Loyal American responded stating that because Joseph had died within two years of the policy's issue date, it would conduct an investigation to determine the truthfulness of his answers on the application. Loyal American discovered that Joseph had been convicted of DUI on June 14, 1989, approximately eight months before he applied for the insurance policy. Loyal American informed Sue Mattiace that it was rescinding Joseph's life insurance policy, based on his DUI conviction.

Section 27-14-7, Ala.Code 1975, allows an insurer to deny benefits if an insured has made misrepresentations that are material to the insurer's acceptance of the risk. Whether an applicant for life insurance has been convicted of DUI is certainly material to the risk accepted by the insurer. DUI convictions indicate a risk of premature death, which means a higher risk; for the higher risk, Loyal American would have charged a higher premium.

Loyal American had a standard procedure for "rating" a policy when the application disclosed a DUI conviction within 12 months of the date of the application and there were no extenuating circumstances. All of the underwriters testified that this was the standard procedure. The procedure was based upon the "driving criticisms" contained in the Hudson manual used by Ms. Dollarhide and Ms. Wilkerson, the Loyal American agents who sold the insurance policy to Joseph. If Joseph had disclosed his conviction for DUI, then Loyal American, in compliance with its standard procedure, regardless of whether there were written instructions, would have issued the

policy only for a lesser amount or only at a higher premium. Because of the material misrepresentation, Loyal American was entitled to rescind the policy, and it had at least a debatable reason for denying the claim.

The majority opinion says that Loyal American had no mechanism to ensure that applicants were treated uniformly during the underwriting process. This ignores the undisputed testimony of all the underwriters that, unless there were extenuating circumstances, Loyal American "rated" all policies in which the applicant disclosed a DUI conviction within 12 months of the date of the application. The policy was rated when the company considered the applicant a higher risk. A "rated" policy resulted in a higher premium. Loyal American applies different "ratings" depending on the amount of enhanced risk. If Loyal American did not have a standard policy concerning DUI convictions, why then did the standard set of questions on the application form contain a question about prior DUI convictions?

A DUI rating would have been based upon Loyal American's standard procedure and on the Hudson manual page used by Ms. Wilkerson and Ms. Dollarhide. The rating would have been consistent and uniform with Loyal American's standard procedure, provided there were no extenuating circumstances.

The plaintiff argues that Loyal American's lack of a written requirement that the Hudson manual be used proves that Loyal American had no consistent procedure. However, this argument mischaracterizes the evidence and advances form over substance. Ms. Dollarhide and Ms. Wilkerson kept the Hudson manual page at their desks and relied upon it only when considering "driving criticisms." Ms. Dollarhide and Ms. Wilkerson both testified that the Hudson manual was the required guideline.

Evidence was produced concerning 27 other policyholders who had disclosed on their applications previous DUI convictions. In 14 of those instances the DUI con-

viction had occurred more than 12 months before the date of the application, and in those instances "standard policies" were issued, in compliance with the Hudson guideline and the policy established by the underwriters' testimony. The remaining 13 policyholders had had a DUI conviction within 12 months of the application. Loyal American issued 10 of those policies on a higher risk-rated basis. The three remaining policies had been issued "standard," based upon extenuating circumstances. The key difference between Joseph Mattiace and the other 27 policyholders is the fact that Mr. Mattiace did not disclose his previous DUI conviction, and the other 27 did. Not only did he have a prior DUI that, without an extenuating circumstance, would have required that he be issued a rated policy, but he failed to disclose that fact to Loyal American.

Under Alabama law, if an insurance carrier has a debatable reason for denying the claim, then there is no bad faith failure to pay, as a matter of law. See National Savings Life Insurance Co. v. Dutton, 419 So.2d 1357 (Ala.1982); National Security Fire & Casualty Co. v. Bowen, 417 So.2d 179 (Ala.1982); and Burns v. Motors Insurance Corp., 530 So.2d 824 (Ala.Civ.App.1987). Because Loyal American had at least a debatable reason to deny the claim, it was entitled to a judgment as a matter of law on the bad faith claim. This Court should reverse the judgment of the trial court and remand with instructions to enter a judgment in favor of Loyal American on both the breach of contract and bad faith claims.

MADDOX, JUSTICE (dissenting).

Today, the majority allows a beneficiary of a life insurance policy to recover punitive damages against an insurer even though there was a legitimate dispute between the beneficiary and the insurer as to whether any benefits were payable under the terms of the policy. The law does not and should not permit this to happen. Therefore, I dissent.

From the date the tort of bad faith failure to pay an insurance claim was created 15 years ago in Chavers v. National Security Fire & Casualty Co., 405 So.2d 1, 7 (Ala.1981), until now, when the tort no longer resembles the tort originally created, I have been concerned that insurers could be assessed punitive damages for conduct that traditionally amount to a simple breach of contract. The result reached by the majority in this case is inconsistent with the fundamental principles of due process, in that the decision permits the infliction of punitive damages in a case in which an insurer legally refused to pay a claim.

When the tort of bad faith was created in Chavers, authorizing the recovery of punitive damages, the majority of the Court at that time stated:

> "[A]n actionable tort arises for an insurer's intentional refusal to settle a direct claim where there is either '(1) no lawful basis for the refusal [to pay] coupled with actual knowledge of that fact or (2) intentional failure to determine whether or not there was any lawful basis for such refusal.' "

405 So.2d at 7. Several members of the Court, as it was then constituted, expressed concern about the creation of the new tort and about the direction the Court was taking. See, Chavers, 405 So.2d at 11-17. (Torbert, C.J., and Maddox, Almon, and Embry, JJ., dissenting).

The concerns of the dissenters were soon fulfilled because it was not long before the Court decided National Savings Life Ins. Co. v. Dutton, 419 So.2d 1357 (Ala. 1982), and modified the test it had established in Chavers. In Dutton, the Court adopted a policy regarding what I call the "normal" versus the "abnormal" bad faith case:

> "In the normal case in order for a plaintiff to make out a prima facie case of bad faith refusal to pay an insurance claim, the proof offered must show that the plaintiff is entitled to a directed verdict on the

> contract claim and thus entitled to recover on the contract claim as a matter of law. Ordinarily, if the evidence produced by either side creates a fact issue with regard to the validity of the claim and, thus, the legitimacy of the denial thereof, the tort claim must fail and should not be submitted to the jury."

419 So.2d at 1362 (emphasis added). The Court today cites both Chavers and Dutton and purports to follow the test set out in Chavers. The majority says that "[i]n bad faith cases involving an insurer's refusal to pay a claim on a policy, this Court has established the 'directed verdict on the contract claim' standard," but in a footnote to that statement of the Chavers rule, the majority states the principle it applies in this case as follows:

> "This [Chavers] test is not applicable to every bad faith claim. Even if an insured is not entitled to a directed verdict on the contract claim, the bad faith claim can be submitted to the jury if the insurer recklessly or intentionally fails to properly investigate a claim or subject the results of the investigation to a cognitive evaluation and review. Further, the trial court need not expressly direct a verdict in favor of the plaintiff on a breach of contract claim in order to submit a bad faith claim to the jury. The trial court must simply determine that the plaintiff has met the standard of proof required for a directed verdict."

—— So.2d at —— (n.2) (citations omitted). The majority then goes further and says: "Thus, a critical issue is whether Loyal American was legally entitled to rescind Joseph's policy based on his failure to inform Loyal American of his DUI conviction." —— So.2d at ——. If the majority, in addressing this "critical issue," was discussing the law relating to the contract claim, I would have no problem with that statement, but the majority is talking about the elements of establishing a bad faith

claim. This holding punishes an insurance company for refusing to pay a claim because the policyholder had intentionally misrepresented a fact on the application for insurance.

A reading of the majority opinion, especially of a footnote in that opinion, convinces me that the majority today completely abandons the "directed verdict test" of Chavers. In Chavers, the majority of the Court unequivocally stated that the plaintiff must show that the insurance company had no legal or factual defense to payment of the insurance claim. 405 So.2d at 7. The test set out today is quite different, and when the two tests are placed side by side, it is obvious that the legal principles set out in Chavers cannot co-exist with the legal principle upon which today's case is decided, because they are directly contradictory one to the other.

Consequently, I must disagree with the majority's permitting the recovery of punitive damages in this case, in which the record shows so plainly that the insured represented to the insurance company that he had no prior DUI convictions, and in which it is quite clear that the plaintiff, no matter what view is taken of the evidence, was not entitled to a directed verdict on the contract claim. The closer question is whether, in view of the insured's misrepresentation, the insurer itself was entitled to a directed verdict on the contract claim and had the right, as a matter of law, to rescind the policy and make a refund of the premiums, as Loyal American contended in the trial court and in this Court. See, Ala.Code 1975, § 27-14-7. Clearly, the law should not allow for the recovery of punitive damages for breach of an insurance contract when there is a dispute between the parties whether the beneficiary of the contract was entitled to any benefits under the policy, a fact not determined until the jury returned a verdict in the plaintiff's favor. Permitting such a recovery, it seems to me, raises federal constitutional questions that implicate the due process clause of

the Fourteenth Amendment. In BMW of North America, Inc. v. Gore, [Ms. 94-896, May 20, 1996] ——, —— S.Ct. —— (1996), the United States Supreme Court held that a state's imposition of economic penalties on those who violate its laws, whether the penalties are legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own citizen-consumers and its economy. How can this judicially imposed penalty support the State public policy of punishing illegal conduct, while prohibiting an insurer from rescending a contract where policyholder is guilty of misconduct. See, Ala. Code 1975, § 27-14-7.

Although I believe that the learned trial judge properly refused to direct a verdict on the contract claim, I believe that he erred in refusing to direct a verdict on the bad faith claim. I can understand the frustration the trial judge must have had in ascertaining whether this was a "normal" or "abnormal" bad faith case, and I do not fault him in view of the fact that this Court keeps changing the rules regarding what constitutes conduct that warrants the imposition of punitive damages.[6] The trial judge was bound by the decisions of this Court, and although normally I would not continue to dissent when this Court has established a principle, but I will continue to dissent in most of these bad faith cases because I

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[6] I have examined the trial judge's comments, and I recognize the dilemma trial judges many times face in determining whether to permit a bad-faith-refusal-to-pay claim to go to a jury. Most of them attempt to apply the Chavers test, attempting to determine whether "the plaintiff is entitled to a directed verdict on the contract claim." It is apparent from the record that the trial judge was aware of the elements of a bad faith claim, as modified by this Court, and was aware that he is bound by our decisions. However, it is also apparent that in ruling on the bad faith claim the trial judge asked questions that were appropriately addressed to the motion for a directed verdict on the contract claim, where the parties did have a debatable issue presented. In my opinion, this should not be the analysis undertaken by a judge when determining whether an insurer can be held liable for "bad faith."

firmly believe that punitive damages are not appropriate in these cases, especially when the right to recover on the contract claim is disputed.

Because I believe that the majority has erred, I dissent and in this dissenting opinion I will state once again why I think the constitutional rights of Loyal American were violated by the court's allowing this jury to punish it even though there was a debatable issue presented on the question of the plaintiff's entitlement to benefits under the policy.[7]

This is not the first time, of course, that this Court has allowed for the recovery of punitive damages even though there was a debatable issue to be resolved by a jury, but it is the first time the Court has issued for publication an opinion showing the extent of the modification of the Chavers rule. In another case that involved comparable circumstances, the Court issued an opinion but later withdrew it.[8] The holding in this case, unfortunately, adds

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[7] That the Court has modified the Chavers test is shown by its holding in this case that "the trial court need not expressly direct a verdict in favor of the plaintiff on a breach of contract claim in order to submit a bad faith claim to the jury," and that "[t]he trial court must simply determine that the plaintiff has met the standard of proof required for a directed verdict." —— So.2d at —— (n.2). If I am reading that statement correctly, it says: If a plaintiff produces enough evidence so that a jury could find that the plaintiff is legally entitled to recover on the contract claim, then the plaintiff's bad faith claim should also be submitted to the jury.

The holding in this case could be summarized as follows: Even if the plaintiff fails to show that he or she is "entitled to recover on the contract claim as a matter of law," the plaintiff can maintain the bad-faith-refusal-to-pay claim if the trial judge is persuaded that the defense to nonpayment interposed by the insurance company, e.g., breach of contract or intentional misrepresentation, was raised as a defense not because the facts supported that defense but merely as an excuse for failing to promptly investigate and pay the claim.

[8] In Auto-Owners Ins. Co. v. Ogden [Ms. 1930368, February 10, 1995] (withdrawn on April 7, 1995), a majority of this Court

more subjectivity to the Chavers test and will be confusing to trial judges when they are faced with an insurer's motion for a directed verdict, as the trial judge in this case was.

I, and other members of this Court, were concerned about the creation of the tort of bad-faith failure to pay an insurance claim 15 years ago in Chavers, and the views we expressed in Chavers should be considered in addition to those I expressed in the case of Life Insurance Co. of Georgia v. Johnson, [Ms. 1940357, April 26, 1996] —— So.2d —— (Ala.1996).

Most of the concerns I have about the bad faith remedy were previously expressed in a dissenting opinion that I wrote in Continental Assur. Co. v. Kountz, 461 So.2d 802 (Ala.1984), where I said:

> "These 'bad faith' cases unfortunately, in my opinion, fail to give to the bench and bar some settled principles to guide them in determining when, and under what circumstances, the tort can be established. That is the reason I consistently dissented, until I joined every member of the Court in National Security Fire and Casualty Co. v. Vintson, 454 So.2d 942 (Ala.1984), in which this Court concluded that a plaintiff had a very heavy burden in establishing a bad faith failure to pay, and that that burden was to show that the insurer, to quote from Vintson, 'had no legal or factual defense to the insurance claim.' The Vintson test at least provided a more objective

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affirmed the submission of a bad faith claim to the jury and the award of $500,000 in punitive damages for the failure to pay on a fire insurance policy, even though the insurance company had presented expert witnesses, including the chief of police and the fire marshal, who expressed the opinion that the evidence, both physical and testimonial, indicated that the fire was caused by arson and even though the insurance company showed that the plaintiffs had never properly filed a claim for payment before suing.

> standard which trial judges, lawyers, and appellate judges could apply."

461 So.2d at 811. I believe the concerns I expressed in Kountz were reiterated by the United States Supreme Court in its recent opinion in BMW, where that Court stated:

> "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose."

—— U.S. at ——, —— S. Ct. at ——. (Emphasis added.)

It is apparent to me that today the tort of bad faith refusal to pay an insurance claim does not resemble the tort that was initially created. As the quantum and standard of proof are relaxed more and more, as in this case, the size of the awards of punitive damages concomitantly increases, creating serious constitutional due process questions.

Several years ago, then Chief Justice Torbert, in Aetna Life Ins. Co. v. Lavoie, 470 So.2d 1060, 1080 (Ala. 1984), suggested that this Court should consider alternatives to the tort of bad faith refusal to pay. He noted:

> "By making it attractive to sue alternatively, or even exclusively, in contract, this Court could have avoided many of the problems associated with developing a new tort. As an added benefit, much of the appellate workload would be reduced in reviewing excessive jury awards of punitive damages, since punitive damages are not available in contract."

I joined him in that view, which the Court has refused to accept.

In Kountz, I suggested that the Legislature might wish to address the public policy concerns shown by the proliferation of cases filed by policyholders who felt that they had been wronged. Although the legislature did not accept my challenge to adopt legislation to allow the recovery of additional damages for claimants forced to go to court to enforce their rights, the legislature did address some of the problems presented by the creation of the tort of bad faith, but this Court has methodically and systematically struck down practically all of that legislation as violating a plaintiff's right to trial by jury, even though the Supreme Court of the United States, in Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1990), in a footnote, made a reference to one of those statutes in its discussion of constitutional protection against excessive jury verdicts. Pacific Mutual, 499 U.S. at 20, n.9.[9]

I have followed the decisions of the United States Supreme Court relating to the recovery of punitive damages, including the latest decision, BMW of North America, Inc. v. Gore, which involved a punitive damages claim based on an alleged misrepresentation by a manufacturer as to repairs made to an automobile. The cases suggest an increasing concern on the part of that Court about standardless awards of punitive damages—and many of those cases are Alabama cases. Although the Supreme

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[9] The United States Supreme Court in Haslip cited the "tort reform" statutes that had been passed by the Alabama legislature. This footnote appeared in the portion of the opinion where the Court was addressing Pacific Mutual's contention that the punitive damages awarded violated its right to due process. The Court held that the review of punitive damages in Alabama did not violate a litigant's right to due process, noting the "cap" statute that had been passed by the legislature. However, the Court stated that "[a]s long as . . . discretion is exercised within reasonable constraints, due process is satisfied. See, e.g., Schall v. Martin, 467 U.S. 253, 279 (1984); Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 16 (1979). See also, McGautha v. California, 402 U.S. 183, 207 (1971)." 499 U.S. at 20. (Emphasis added.)

Court, in the BMW case, did not draw a "bright line" distinction between what amount is permissible and what amount would be so greatly disproportionate to the award of compensatory damages as to offend the Constitution, it did set forth several general principles of law, one of which was articulated in Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort"). It seems to me that the insurer in this case had a legal right to dispute the claim; therefore, to punish the insurer for refusing to pay the claim is a due process violation.

Based on the foregoing, I believe that this Court should grant Loyal American the relief to which it is entitled under the law.

Before concluding this dissent, I write about one other portion of the majority opinion, which addresses Loyal American's argument that § 11 of Alabama's constitution was violated by the judgment in this case because, it argues, the right to trial by jury was "frozen" by the ratification of the 1901 Constitution and the bad faith cause of action was not created until 1981. I agree with the majority's conclusion that § 11 applies to "[c]ommon law causes of action" and that those actions "are those in which legal rights are determined, as opposed to equitable rights." —— So.2d at ——. That holding is consistent with what I said in my discussion of § 11 in my dissent in Henderson v. Alabama Power Co., 627 So.2d 878 (Ala.1993), but I must respectfully disagree with the majority's statement that in Gilbreath v. Wallace, 292 Ala. 267, 292 So.2d 651 (1974), the Court's statement using the word "frozen" was "dictum." In Moore v. Mobile Infirmary Association, 592 So.2d 156, 159 (Ala. 1991), this Court said:

> "The right to a jury trial in the courts of this state is guaranteed by Ala. Const. art. I, § 11. Section

> 11 provides in toto: 'That the right of trial by jury shall remain inviolate.' As we explained in Gilbreath v. Wallace, 292 Ala. 267, 292 So.2d 651 (1974), the 'crucial words' found in that section are ' "shall remain inviolate." ' The clause 'forbid[s] the state through the legislative, judicial, or executive department—one or all—from ever burdening, disturbing, qualifying, or tampering with this right to the prejudice of the people. Id. at 271, 292 So.2d at 655. Section 11 'freezes' the right to trial by jury as that right existed in 1901, the date of the ratification of our present Constitution. Id. at 269, 292 So.2d at 652; see also J. Hoffman, Alabama's Right to Trial by Jury in Civil Cases Since the Merger of Law and

Equity—What Has Changed and What Has Not, 32 Ala. L.Rev. 465, 488-89 (1981).

> "It is undisputed that juries were employed in Alabama in 1901 to assess 'quality of life' damages—damages for pain, suffering, and other non economic loss in actions alleging negligent personal injury. See, e.g., Ensley Ry. v. Chewning, 93 Ala. 24, 9 So. 458 (1891); South & North Alabama R.R. v. McLendon, 63 Ala. 266 (1879); Barbour County v. Horn, 48 Ala. 566 (1872)."

If I am reading that statement in Moore correctly, it is bottomed on a statement made in Gilbreath v. Wallace, that statement in Gilbreath v. Wallace cannot, as the majority contends, be classified as "dictum." [10]

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[10] Black's Law Dictionary defines "dicta" as:

"Opinions of a judge which do not embody the resolution or determination of the specific case before the court. Expressions in [a] court's opinion which go beyond the facts before [the] author of [the] opinion and not binding in subsequent cases as legal precedent."

Black's Law Dictionary 454 (6th ed. 1991).

The majority quickly and decisively dismisses Loyal American's federal constitutional claims of a denial of equal protection of the law, on the ground that Loyal American cites no authority in support of those claims. Although I note that Loyal American does not devote a significant portion of its argument to its constitutional claims, it does make this argument in its brief:

> "Plaintiff's bad faith claim violates Loyal American's right to a jury trial as guaranteed by the Alabama Constitution. This Court's tort reform cases have established that the right to jury trial clause of the Alabama Constitution, Ala. Const. art. I, § 11 (1901), prevents the legislative, executive, and judicial departments from burdening the right as it existed in 1901.
>
> " 'The clause "forbid[s] the state through the legislative, judicial, or executive department—one or all—from ever burdening, disturbing, qualifying, or tampering with this right to the prejudice of the people. . . ." Section 11 "freezes" the right to trial by jury as that right existed in 1901, the date of the ratification of our present Constitution.'
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> Moore v. Mobile Infirmary Association, 592 So.2d 156, 159 (Ala.1991) (emphasis added). This Court's rationale is based upon the proposition that the adoption of the 1901 Constitution froze the rights as they existed at that time. See, Smith v. Schulte, [Ms. 1930362, Aug. 18, 1995] —— So.2d —— (Ala.1995); Henderson v. Alabama Power Co., 627 So.2d 878 (Ala.1993); Moore, 592 So.2d 156; and Gilbreath v. Wallace, 292 Ala. 267, 292 So.2d 651 (1974).
>
> "This Court has relied upon this proposition to declare certain tort reform statutes unconstitutional. See, Smith v. Schulte (declaring $1,000,000 cap on jury awards in medical malpractice cases unconstitu-

> tional); Henderson, 627 So.2d 878 (declaring $250,000 cap on punitive damages unconstitutional); and Moore, 592 So.2d 156 (declaring $400,000 cap on noneconomic damages in medical malpractice cases unconstitutional). As this Court recognized in Moore, § 11's prohibition on interference with the right of jury trial is not limited to the legislative and executive departments of the State. Moore, 592 So.2d at 159. The same prohibition prevents this Court from 'ever burdening, disturbing, qualifying, or tampering with this right to the prejudice of the people.' Id."

Loyal American's argument is correct. Before 1981, claimants such as this plaintiff could not recover damages for personal injury, inconvenience, annoyance, mental anguish or suffering, and/or punitive damages arising out of the failure to pay benefits under an insurance policy. In fact, this Court, not the legislature, created the tort, and did so only 15 years ago. In fact, in 1987, the legislature, after vigorous debates, adopted a series of what has commonly been referred to as "tort reform" laws, which addressed the issue of the award of punitive damages in such cases, and it was this Court that declared many of those laws to be unconstitutional as violating a plaintiff's right to trial by jury. See, Smith v. Schulte, [Ms. 1930362, Aug. 18, 1995] —— So.2d —— (Ala. 1995); Henderson v. Alabama Power Co., 627 So.2d 878 (Ala.1993); Moore, 592 So.2d 156. However, this Court has made one exception to the rule that these legislative caps violate the Alabama Constitution.[11]

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[11] The Court held, in Garner v. Covington County, 624 So.2d 1346, 1354-55 (Ala.1993), that the Legislature had the power to cap punitive damages in cases involving cities and counties, "[b]ecause cities and counties are exercising governmental functions, . . . and because judgments against them must be paid out of public moneys derived from taxation, the reasonable limitation of

Under the provisions of the Fourteenth Amendment to the Constitution of the United States, corporate citizens like Loyal American are guaranteed the right to equal protection of the laws and the right to due process of law. In the BMW case, the United States Supreme Court stated:

> "The fact that BMW is a large corporation rather than an inpecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participants in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce."

—— U.S. at ——, —— S.Ct. at ——. Allowing the jury to penalize this defendant based on the alleged wrong committed in this case constitutes a denial of its basic rights, and I believe Loyal American has adequately raised its claim to that constitutional protection. Consequently, I must disagree with the majority's statement that the constitutional claims were not presented. Clearly they were.

11-93-2 [, Ala.Code 1975,] on awards against them must be sustained." (Emphasis added.)

I concurred specially in Garner, stating that although I agreed with the majority that the legislature has the power to cap damages against governmental entities, I thought that neither § 11 nor § 13 of the Alabama Constitution limits the power of that body to limit damages in purely private cases. See Garner, 624 So.2d at 1355-56 (Maddox, J., concurring specially). In light of the holding in Garner, it apears that the character of the defendant should be a factor a court considers when interpreting a constitutional provision.

APPENDIX B

RECENT DECISIONS OF THE SUPREME COURT OF ALABAMA AND OTHER DEVELOPMENTS ADVERSELY IMPACTING CIVIL DEFENSE PRACTICE

This listing reflects some of the changes in the Alabama legal environment which have had a negative effect on the defense of civil actions. Some of these Supreme Court of Alabama decisions, the adoption of the new rules of Civil Procedure, and other developments noted herein, were both needed and desired. However, the cumulative effect of all of these developments and decisions, has been to tilt the scales heavily against defendants.

1975

Alabama Rules of Civil Procedure: Notice pleading simplifies the initiation of actions for plaintiffs, but strict requirements remain for defendants in asserting defenses.

Governmental Immunity: The doctrine of municipal immunity for tort is abolished. Jackson v. City of Florence, 320 So. 2d 68, 294 Ala. 592 (1975).

1976

Alabama Extended Manufacturers Liability Doctrine creates a cause of action against manufacturers and limits the availability of defenses, further narrowed by later cases limiting the availability of contributory negligence as a defense. Casrell v. Altec, 335 So. 2d 128 (Ala. 1976); Atkins v. AMC, 335 So. 2d 134 (Ala. 1976); Dennis v. American Honda, 585 So. 2d 128 (Ala. 1991).

Contributory Negligence Charge "Slightest Degree" Improper: It is improper to charge the jury that under contributory negligence the slightest lack of ordinary care bars a recovery. Hamilton v. Kinsey, 337 So. 2d 344 (1976); See Also Parker v. Williams, 268 So. 2d 746 (Ala. 1972).

1981

The Tort of Outrage is created to apply where conduct is so extreme as to go beyond all possible bounds of decency. This tort will admittedly allow a recovery for pure emotional damages. American Road Service Co. v. Inmon, 394 So. 2d 361 (Ala. 1981).

The Tort of Bad Faith is created to hold insurers liable for bad faith refusal to pay a claim. Chavers v. Nat'l Sec. Fire & Gas Co., 405 So. 2d 1 (Ala. 1981); National Security Fire and Casualty Co. v. Bowen, 417 So. 2d 179 (Ala. 1982); See also Bush v. Alabama Farm Bureau Mutual Casualty Insurance Co., 576 So. 2d 175 (Ala. 1991); Standard Plan v. Tucker, 582 So. 2d 1024, 1028 (Ala. 1991); Peek v. Reserve Nat. Ins. Co., 585 So. 2d 1303 (Ala. 1991); Countryside Roofing and Sheet Metal v. Mutual Benefit Life Insurance Company, 587 So. 2d 987 (Ala. 1991).

Recovery For Mental Distress is allowed without proof of physical injury. Taylor v. Baptist Medical Center, Inc., 400 So. 2d 369, 374 (Ala. 1981).

1982

Product Liability Statute of Repose: Ala. Code □6-5-502 (1975), creating a ten year limitations period for the commencement of product liability actions against original sellers of equipment is stricken as unconstitutional. Lankford v. Sullivan, Long, & Hagerty, 416 So. 2d 996 (Ala. 1982).

1984

Voir Dire Questioning of the Jury On Insurance: A question on voir dire asking whether members of the venire or their family worked for any insurance company is not grounds for reversal. Alabama Power Company v. Bonner, 459 So. 2d 827 (Ala. 1984); See also Burlington Northern R. Co. v. Whitt, 575 So. 2d 1011 (Ala. 1990) (Inquiry on voir dire in suit arising out of grade-crossing

collision as to whether any member of venire was insurance adjuster is legitimate and does not result in ineradicable prejudice).

"Occurrence" Determined by Subjective Standard in insurance policies. Whether an event or an accident is "expected or intended" by the insured is no longer judged by an objective standard of conduct, but by the subjective intent of the insured, even where the outcome is the natural and probable consequence of a voluntary act. Ala. Farm Bureau Mut. Cas. Ins. Co. v. Dyer, 454 So. 2d 921 (Ala. 1984).

1986

Punitive Damages need bear no particular relationship to actual damages. Yesterday's Inc. v. Lamey, 492 So. 2d 988 (Ala. 1986) (In effect overruling the old "general rule" that "the amount awarded as damages must bear some reasonable relation to the injury sustained and even though there may be a small amount of actual damages to be awarded, the amount allowed as punitive damages should not be disproportionate thereto." Roberson v. McCarley, 259 Ala. 583, 67 So. 2d 814, 817 (1953)). See also, Nettles & Latta, Punitive Damages: Danger, Frustration, and Changes, Oct. 1988 Ala. Defense Lawyers Assn. J.

Wantonness Question For Jury: Where there is any evidence of wantonness, it is improper for the trial court to take the issue from a jury. Burns v. Moore, 494 So. 2d 4 (Ala. 1986) (The question of whether conduct arises above simple negligence to the level of wantonness is for the jury unless there is a total lack of any evidence from which the jury could reasonably infer a higher degree of culpability.); See also Weatherly v. Hunter, 510 So. 2d 151 (Ala. 1987) (Evidence that motorist failed to keep a proper lookout presented jury question on wantonness); McDougle v. Shaddrix, 534 So. 2d 228 (Ala. 1988).

Hospital Immunity stricken as unconstitutional: The statute which grants hospitals immunity from suit is held

to violate equal protection. Chandler v. Hospital Authority of Huntsville, 500 So. 2d 1012 (Ala. 1986).

Intentional Interference with business or contractual relations: A new tort broadens Alabama's formerly narrow recognition of the tort of interference with contractual relations, allowing an action for not only tortious interference with a contract but also for interference with non-contractual business relations. Gross v. Lowder Rlty. Better Homes & Gardens, 494 So. 2d 590 (Ala. 1986) (New rule expands the older, more narrow cause of action which allowed recovery only for interference with an employer-employee relation, of where a party to a lease has been coerced or fraudulently induced to breach his contract).

1987

Enhanced duty of Good Faith: The court enhances the obligation of good faith by extending an insurer's duty when defending an insured under a reservation of rights. L&S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co., 521 So. 2d 1298 (Ala. 1987) (An insurer must thoroughly investigate the cause of the accident, the nature and severity of the injury, must retain competent councel for the insured, and must inform the insured of any and all developments relevant to policy coverage).

1988

Error Without Injury rule allows wide latitude to trial judge in determining the effect of improper remarks before the jury Bohannon v. Driskell, 519 So. 2d 1314 (Ala. 1988) (No new trial granted where improper remarks can be considered error without injury); See also Rule 45, Ala.R.App.P.

Mental Distress: A claim of mental distress for breach of contract is allowed for termite damage to the plaintiff's home. Orkin Exterminating Co. v. Donovan, 519 So. 2d 1330 (Ala. 1988).

"Puffing" Defense To Fraud Action Curtailed: Puffing is no defense to an insurance agent's statements that one policy is better than another. The statement creates a jury issue on fraud. Tribble v. Provident Life & Acc. Ins. Co., 534 So. 2d 1096 (Ala. 1988).

1989

Effect of Releases Narrowed: Releases which purport to disallow future actions against any party involved in causing the injury are ineffective as to unnamed third parties, notwithstanding language to the contrary releasing those parties. Pierce v. Orr, 540 So. 2d 1364 (Ala. 1989) (Discontinues practice of allowing unnamed third party release where the third party has not paid consideration unless they demonstrate by substantial evidence that they are the parties intended to be released).

Parental Immunity Abolished In Some Cases: Parents may now be held liable in tort by their children. Hurst v. Capitell, 539 So. 2d 264 (Ala. 1989) (Immunity abolished at least as to sexual abuse cases); Mitchell v. Davis, 1992 WL 76303 (Ala. 1992) (Doctrine of parental immunity as to foster parents qualified to protect them only against claims of simple negligence).

Slip-and-Fall: The fact that a plaintiff had a "wet seat" is sufficient to defeat a motion for summary judgment, notwithstanding the fact that no one ever saw or discovered a wet area on the floor which could have caused plaintiff's fall. Cox v. Western Supermarket, 557 So. 2d 831 (1989). See also Western Supermarkets, Inc. v. Cox, 584 So. 2d 820 (Ala. 1991) (Affirming a $17,500 verdict on remand).

Batson is extended to a civil suit context, limiting the right of parties to exercise their peremptory challenges. Thomas v. Diversified Contractors Inc., 551 So. 2d 343 (Ala. 1989) (Applying Batson in civil context); Sumlin v. Moore, 583 So. 2d 1320 (Ala. 1991) (Defendant's

peremptory strikes of 8 out of 9 venire members who were black was held to be a mere pretext for discrimination.) See also Ex parte Mathis, 26 ABR 399 (Nov. 15, 1991). With probable eventual expansion to gender based challenges, such holdings of necessity favor individuals over corporate or business entities.

1990

"Good faith error in judgment" Jury Charge Disallowed for Medical Malpractice Defendants: It is improper to instruct the jury that the doctor may not be guilty of medical malpractice if he committed "a good faith error in judgment" but still met the standard of care required of a medical provider. Shumaker v. Johnson, 571 So. 2d 991 (Ala. 1990).

Permissible Basis of Expert Testimony Broadened; Expert witness testimony based upon opinions of others is admissible. Nash v. Cosby, 574 So. 2d 700 (Ala. 1990) (Modifies prohibition against expert testimony based upon an opinion by allowing plaintiff's expert testimony based upon medical records); Brillant v. Royal, 582 So. 2d 512 (Ala. 1991) (Modifies prohibition and allows expert testimony based upon the opinion of others).

Subrogation: The right of any party who indemnifies another to share in the recovery the other party receives does not arise until that other party is fully compensated for his injuries. Powell v. Blue Cross/Blue Shield, 581 So. 2d 772 (Ala. 1990) (The right of subrogation does not arise until the insured/indemnitee has been fully compensated. This decision is applicable to any indemnitor seeking subrogation, except in Workmen's Compensation cases).

Dram Shop Liability: The voluntary consumption of excessive amounts of alcohol as contributory negligence or complicity is not a viable defense to actions based upon the Dram Shop Statute □6-5-71 Code of Ala. James v. Brewton Motel Management, Inc., 570 So. 2d 1225 (Ala.

1990). See also McIssac v. Monte Carlo Club 570 So. 2d 1225 (Ala. 1991).

Medical Malpractice Statute of Limitations Tolled: The statute of limitations which requires suit to be brought "within two years after the act of or omission . . . giving rise to the claim[]" □6-5-482 Code of Ala. is interpreted as meaning that the time does not begin to run until the act results in injury. Colburn v. Wilson, 570 So. 2d 652 (Ala. 1990) (An action accrues when act complained of results in an injury, not when it occurs).

Enhanced Duty of Good Faith is expanded to require an insurer defending an insured under a reservation of rights to indemnify the insured for any liability in the underlying action, even though no coverage exists, due to the insurer's failure to keep the insured fully advised. Shelby Steel Fabricators, Inc. v. United States Fidelity & Guaranty Ins. Co., 569 So.2d 309 (Ala. 1990).

Exception to Employee At Will Doctrine Threatened: In a suit by a former insurance agent claiming wrongful termination against the company which terminated him, the Supreme Court affirmed summary judgment stating that company had right under the employee at will doctrine to terminate the agent's contract, even if it did so with malice or for an improper reason. Horsby, CJ concurred specially, but stated that the court should create a public policy based remedy for employees who may be subjected to blackmail for doing or not doing certain acts, and exception to the employee at will doctrine. Salter v. Alfa Ins. Co., Inc., 561 So. 2d 1050 (Ala. 1990).

1991

Justifiable Reliance Standard in Fraud Cases is a Question for the Jury: The "reasonable reliance" standard is replaced by a "justifiable reliance standard" allowing viable fraud actions based upon alleged oral misrepresentations even though they are contradicted by the terms of a

written contract. Hicks v. Globe Life & Accident Ins. Co., 584 So. 2d 458 (Ala. 1991) (Despite the fact that the plaintiff did not read the policy, and that had plaintiff done so, she would have discovered the absence of coverage, there was a question of fact as to whether she justifiably relied upon an agent's misrepresentations.) See also Hickox v. Stover, 551 So. 2d 259 (Ala. 1989); Southern States Ford v. Proctor, 541 So. 2d 1087; Grimes v. Liberty Nat'l 551 So. 2d 329 (Ala. 1989); Liberty National v. Sherril, 551 So. 2d 272 (Ala. 1989); General Motors Acceptance Corp., Inc. v. Covington, 586 So. 2d 178 (Ala. 1991) (Defendant's agent's promise to "take care" of plaintiff's purchase of credit life insurance sufficient to sustain a $75,000 damages award notwithstanding fact that plaintiff never signed an application, documents, never received a bill, the cost was not reflected on his monthly bill, and he never received any verification.); McCullough v. McAnalley, 590 So. 2d 229 (Ala. 1991) (Alleged misrepresentations concerning a warranty against water damage to plaintiff's home presented a jury question on justifiable reliance, notwithstanding the fact that the misrepresentations were contradicted by the written contract); Harris v. M & S Toyota, 575 So. 2d 74 (Ala. 1991) (Party making a statement has the burden of knowing that it is not dishonest, reckless, or inaccurate & the party receiving the statement must be alert to statements that are patently false.)

Tort Reform Legislation Stricken: Major portions of the 1987 Tort Reform legislation, designed to restore balance to the civil justice system, are stricken. Moore v. Mobile Infirmary, 592 So. 2d 156 (Ala. 1991) (Striking $400,000 cap on non-economic damages in medical cases as violative of equal protection and the right to trial by jury.); Clark v. Container Corp, 589 So. 2d 184 (Ala. 1991) (Striking periodic payment of future damages as violative of right to trial by jury); Armstrong v. Roger's Outdoor Sports, Inc., 581 So. 2d 414 (Ala. 1991) (Striking the independent review by the trial judge of jury

award of punitive damages as violative of separation of powers).

Premises Liability Extended: Where there is evidence that one party had the "right of control" over another, the issue of whether the plaintiff is an independent contractor, and is thus owed no duty of care, or is an employee, and is owed a duty, is for the jury. Gordon v. Davis, 585 So. 2d 893 (Ala. 1991) (Evidence that landowner asked a neighbor to saw a limb out of a tree rented a chain saw for his use, and told him how to do it presented an issue of fact as to whether neighbor was an "employee" or an independent contractor, thereby precluding summary judgment on liability issue arising out of injury); Casey v. Oliver, 577 So. 2d 453 (Ala. 1991) (Directed verdict for great-granddaughter of a child who ingested tranquilizers while at her home reversed); See also Young v. Huntsville Hospital, 1992 WL 45557 (Ala. 1992) (Holding hospital liable for the third party criminal acts of another where an anesthetized patient was sexually assaulted, thereby extending the duty a hospital owes its patients).

Accidental Death is Accidental Result: An insured's death is considered accidental, notwithstanding the fact that it was caused by the intentional ingestion of excessive amounts of alcohol, because the result, death, was unexpected or unforeseen. Hairston v. Liberty National Life Ins. Co., 584 So. 2d 807 (Ala. 1991).

Action of Agent Held as Waiver of Defenses: In a breach of contract/bad faith action, the acts of an agent may be imputed to the company and may waive defenses. Peek v. Reserve Nat. Ins. Co., 585 So. 2d 1303 (Ala. 1991) (issue of whether insureds relied upon misrepresentation by insurer's agent presented jury question on fraudulent misrepresentation claim when insurer denied coverage because insured's ovarian cyst was a preexisting condition, notwithstanding the fact that insureds were informed of limitation on preexisting illness by policy).

Agency of independent Contractor's Employee is a Jury Question: Despite the fact that it was undisputed that

the employee of a physician/independent contractor was not an employee of a hospital, nevertheless, a jury question is presented as to whether the hospital could be held liable for the acts of the employee under a vicarious liability or agency theory. Briggins v. Shelby Medical Center, 585 So. 2d 912 (Ala. 1991).

Expanded Discovery: Recent decisions serve to greatly broaden the scope of materials discoverable. Ex parte Clarke, 582 So. 2d 1064 (Ala. 1991) (In an action where fraudulent practices against policyholders have been alleged, the defendant must disclose not only the names of policyholders, but also their addresses and phone numbers and the court may not restrict the use of same).

Workmen's Compensation: Prolonged exposure to a particular happening over a seven and a half year period of time has been held to constitute an accident as defined under the Act. Ex parte Harris, 590 So. 2d 285 (Ala. 1991), on remand, 590 So. 2d 287 (Ala. Civ. App. 1991). Co-employee Suits: The Workman's Compensation Act provides for suits against co-employees only in cases of willful conduct such as removal of a safety device. The phrase "willful removal of a safety device" has been construed to include bypassing a palm control button on a 40 year old press which was reassembled, Harris v. Gill, 585 So. 2d 831 (Ala. 1991), failure to maintain or repair a door on a car used on the job, Moore v. Reeves, 589 So. 2d 173 (Ala. 1991). See also Bailey v. Hogg, 547 So. 2d 498 (Ala. 1989) (Failure to install a safety device provided by the manufacturer as removal of safety device).

Election of Remedies Not Required: A plaintiff is not precluded from prosecuting a survival claim for personal injury and a wrongful death claim in the same action by the fact that such claims are alternative, inconsistent, and mutually exclusive. Ex Parte King, 591 So. 2d 464 (Ala. 1991).

Avoidance of Statute of Limitations in Medical Liability Act: The court recognizes that a plaintiff can avoid the statute limitations contained in the Alabama Medical Liability Act, □6-5-482(a) Code of Ala., by pleading fraudulent concealment. Trammer v. Bernstein, 1991 WL 183973 (Ala. 1991) (Where plaintiff alleges that physician fraudulently concealed that plaintiff would need additional surgery, he states a claim for fraud, not negligence, and thereby avoids the statute of limitations in the Act.)

1992

Increase in Punitive Damages Verdicts Affirmed: Union Mortgage Co., Inc. v. Barlow, 1991 WL 294527 (Ala. 1992), affirming a $6,000,000 fraud verdict (The previous high was $5 million. Smith v. MBL Life Assurance Corp, 1991 WL 184448 (1991)); General Motors Corp. v. Johnston, 592 So. 2d 1054 (Ala. 1992), affirming award of $7.5 million after remittitur of a $15 million wrongful death verdict. [The previous high was $3.5 million. Black Belt Wood Yard v. Sessions, 514 So. 2d 1249 (Ala. 1986)].

Uninsured Motorist Coverage Liberalized: Res ipsa may be used to demonstrate the negligence of a "phantom driver" and thus trigger uninsured motorist coverage. Khirieh v. State Farm, 1992 WL 28970 (Ala. 1992); ALFA v. Beard 1992 WL 28986 (Ala. 1992) (Plaintiff motorist who struck gravel and was injured allowed to prove circumstantially that gravel resulted from an unknown motorist's negligence, thus triggering uninsured motorist coverage).

Childproof Lighter: A warning of danger may be required notwithstanding the open and obvious nature of the danger. Bean v. Bic Corp., 1992 WL 76122 (Ala. 1992).

Homeowner's Insurance Coverage expanded by Allstate Ins. Co. v. Hilley, 1992 WL 51235 (Ala.), affirming a $2,000,000 fraud verdict based upon an agent's alleged

fraudulent misrepresentation that replacement cost would be paid even if the policyholder did not rebuild. See also Livingston v. Auto Owner's Ins., 582 So. 2d 1038 (Ala. 1991) (Allowing recovery under theory of bad faith for delaying payment where suit was filed before the running of the 60 day investigation period contained in the insurance contract).

Evidence of Prior Lawsuit against Defense Medical Expert Admissible: Evidence regarding a medical expert witness' recent involvement as a defendant in a medical negligence suit deemed admissible. The trial court's disallowing questions regarding the suit was erroneous and required a new trial. Clements v. Stewart, 1992 WL 35396 (Ala. 1992).

Corporate Liability Doctrine Applied to Hospitals: Although not an employee or agent, a hospital may be held liable for a physician's malpractice under a "corporate liability" theory. Humana Medical Corp. v. Traffanstedt, 1992 WL 41209 (Ala. 1992) (The jury must first find the doctor guilty of malpractice, then may attribute injury caused by his malpractice to the hospital because of its underlying negligence in placing him on its staff, notwithstanding the complete absence of evidence that the doctor was an employee or agent).

Government Entity/Employee Discretionary Function Immunity Eroded: Deposition testimony of two traffic engineers is held sufficient "substantial evidence" of notice to overcome a motion for summary judgment regarding a duty on a county to post warning signs. Mixon v. Houston County, 1992 WL 27941 (Ala. 1992) (Although the evidence failed to show a history of accidents upon the particular road in question, a jury question existed as to whether the county had breached a duty to make a road save for travel by posting a sign warning of a sharp turn); Taylor v. Shoemaker, 1992 WL 10606 (Ala.1992) (Driver who swerved to avoid a collision, striking a permanent object near an intersection, was not barred from

stating a cause of action against the Highway Department employees who placed the object by the immunity granted state employees performing discretionary duties.) See also Point Property Inc. v. Anderson, 584 So. 2d 1332 (Ala. 1991) (Summary judgment improper on basis of absolute or discretionary immunity in attempting to question the validity of the vacation of a roadway where reasonable government officials in the position of defendants would have known that their actions violated constitutional law).

Statute of Limitations Tolled by Continuous Nature of Harm: Where a party is continuously exposed to a harmful substance, the statute of limitations does not begin to run until the last day of exposure, regardless of whether the exposure manifests itself through symptoms of illness prior to the last day. Hillis v. Rentokil, Inc., 1992 WL 5264 (Ala. 1992) (An employee, who was exposed to a chemical on a daily basis and who manifested exposure through loss of his voice and red spots on his skin, was not barred by the statute of limitations notwithstanding the fact that the symptoms occurred more than 2 years before he filed the suit).

Dog Bite Case: Evidence of the vicious propensity of a breed of domestic animals is now attributable to a specific animal. Rice v. Humphries, 1992 WL 10590 (Ala. 1992).

Agent's Statement Held to Toll the Running of The Statute of Limitations: In a fraud claim against an insurance company, the adjustor's statement agreeing to look into plaintiff's claim that more money was due her is held to create a jury question on the discovery of fraud, precluding summary judgment. Moseley v. State Farm Fire & Cas. Ins. Co., 1992 WL 2089 (Ala. 1992) (Summary judgment improperly granted on the basis of the statute of limitations where the adjuster's statement held

to create a fact question as to when the alleged fraud was discovered, notwithstanding the fact that the policy did not promise that the limits of the policy would be paid in the event of a total loss).

APRIL 1992

Manufacturer's liability expanded. The manufacturer of an air freshener intentionally used as an inhalant may be held liable for an auto accident despite the fact that the driver intentionally inhaled the product, felt dizzy, and operated her vehicle. Kelly v. M. Trigg Enterprises, Inc., 605 So. 2d 1185 (Ala. 1992).

1993

Torts—Compensatory Award Not Necessary for Punitive Award: The Court determined that an award of compensatory damage is not necessary to support a jury's award of punitive damages where the record clearly supports the jury's finding plaintiff has been injured by defendant's fraudulent conduct. Garrett v. City of Auburn, 623 So.2d 1033 (Ala. 1993).

Torts—Liability of Third Party: A lease provision can be sufficient notice to create an issue of fact on the reasonable foreseeability of criminal acts by third parties. L.M.S. v. Angels Corp., Inc., 621 So.2d 246 (Ala. 1993) (A landlord can be liable for the rape of a tenant for failing to maintain the premises).

$250,000.00 Cap Unconstitutional: The Court held that a $250,000.00 cap on punitive damages was unconstitutional as a violation of the right to jury trial. Henderson v. Alabama Power Co., 627 So.2d 878 (Ala. 1993).

1994

Fraud—? to Restore Policies: An insurance company can be liable for fraudulent acts of its agent even where the company had no knowledge of the acts, and when the

fraud was discovered by the company, the company offered to restore the policies and compensate potentially effected customers. Northwestern Mutual Life Ins. Co. v. Sheridan, 630 So. 2d 384 (Ala. 1993)

Written Notice of Safety Rule Violation: Alabama Code ☐ 25-5-11.1 requires that written notice of a safety violation before such violation can be used to support a cause of action. The Court determined that plaintiff's oral complaints and OSHA complaint satisfied the code thereby abrogating the clear legislative intent. Morgan v. Northwest Alabama Regional Medical Center, Need Cite

Change of Reasonable Reliance Standard: The Court suddenly changed from justifiable reliance to reasonable reliance in a new car bad paint fraud case. The Court suddenly changed established Alabama law. Dodd v. Nelda Stevenson Chevrolet, Inc., 626 So. 2d 1288 (Ala. 1993).

Disclosure of Fees and Mortgage Transactions: Where a mortgage lender does business through a mortgage broker or correspondent lender, the entire nature of the relationship must be disclosed, as well as the nature of all transaction fees. Smith v. First Family Financial Services, Inc., 262 So. 2d 1266 (Ala. 1993).

Court Recognizes Claim for Wrongful Birth: Plaintiffs recovered for emotional distress, cost of treatment and resources, physical pain of mother and loss of consortium where defendants negligently performed a sonogram which would have disclosed severe birth defects and lead to an abortion. It is now possible to recover, in Alabama, for wrongful birth. Keel v. Banach, 624 So.2d 1022 (Ala. 1993).

Allegations of similar conduct used as punitive damages multiplier. The admission of evidence of other alleged bad acts was permitted at trial and used to increase punitive damages against a defendant. Gore v. BMW, 646 So.2d 619 (Ala. 1994)

1995

Medical malpractice cap of $1,000,000 ruled unconstitutional. The statute limiting damages in a medical malpractice action to $1,000,00 (adjusted for inflation) is held to violate the equal protection and right to jury trial guarantees of the Alabama Constitution. Smith v. Schulte, 1995 WL 491245 (Ala. 1995)

Wealth of defendant at issue in all cases seeking punitive damages. A sweeping change in civil trial practice permits the introduction and argument as to the wealth of defendants in civil trials seeking punitive damages. Johnson v. Life of Georgia, (Ala. 1995)

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No. 96-308

In The

Supreme Court of the United States

October Term, 1995

LOYAL AMERICAN LIFE INSURANCE COMPANY, INC.,

Petitioner,

v.

SUE M. MATTIACE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Sue M. Mattiace, respectfully submits this brief in opposition to the petition of Loyal American Life Insurance Company, Inc. for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

STATEMENT OF THE CASE

The petition filed in this Court raises only one question. Loyal American Life Insurance Company contends that when the Alabama Supreme Court recognized the tort of bad faith, it violated that insurer's right to trial by jury by the recognition of this tort at a time after the Constitution of the State of Alabama recognized the right to trial by jury. No attack is made regarding the legal resolution of this particular case through the jury trial in circuit court and the affirmance of a judgment in favor of the petitioner by the Alabama Supreme Court. Indeed, the petition states that "The facts at issue in the underlying dispute are not material to the constitutional issue presented herein." (Petitioner's Brief at p. 6)

REASON FOR DENYING THE WRIT

1. The recognition of the tort of bad faith as a common law remedy is a valid remedy which has no constitutional infirmity that violates the petitioner's right to equal protection.

The Alabama Supreme Court recognized the intentional tort of bad faith in first party insurance actions in *Chavers v. National Security Fire & Casualty Company,* 405 So.2d 1 (Ala. 1981). The Court relied upon similar recognition made in other states with particular emphasis on the State of Wisconsin's decision in *Anderson v. Continental Insurance Company,* 85 Wis.2d 675, 271 N.W.2d 368 (1978). (The Wisconsin law was reviewed by this Court in *Allis-Chalmers Corp. v. Luek,* 471 U.S. 200, 105 S.Ct. 1904 (1985).) The elements of this tort were further clarified by the Alabama Supreme Court in *National Security Fire & Casualty Company v. Bowen,* 417 So.2d 179 (Ala. 1982) where the following elements were enunciated:

> A.) An insurance contract between the parties and a breach thereof by the defendant;
>
> B.) An intentional refusal to pay the insured's claim;
>
> C.) The absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason);
>
> D.) The insurer's actual knowledge of the absence of any legitimate or arguable reason;
>
> E.) If intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim.

This tort finds its genesis in contract law requiring good faith regarding the common purpose and consistency with the justified expectations of the parties to the contract. (Restatement (Second) of Contracts §205)

Petitioner makes a direct attack on the very foundation of the common law. Petitioner contends that the recognition of this action violates its right to trial by jury as guaranteed by the Alabama Constitution. Petitioner argues that this right to trial by jury was "frozen" in Section 11 of the Alabama Constitution as that right existed in 1901 when the present Constitution was ratified. (Petitioner's Brief at p. 11) This argument is simply stated as asserting that since this tort of bad faith was recognized by the Alabama Supreme Court in 1981, it was an invalid encroachment on the "frozen" right to trial by jury as established in the Alabama Constitution in 1901. Therefore, the argument maintains that the very breath of the common law and its evolutionary basis was "frozen" by the Alabama Constitution in 1901 and this basic doctrine of American and Alabama jurisprudence has been paralyzed.

The proposition set forth by Petitioner ignores the very nature of the common law. The essence of the common law is its "inherent capacity . . . for growth and change." 15A Am.Jur.2d *Common Law* §3 (1976) The Alabama Supreme Court has recognized and embraced the capacity of the common law to adopt to changing needs of society. The Court observed in *Woodmen of the World Life Insurance Society v. Guyton*, 239 Ala. 216, 194 So. 655 (1940):

> "[T]he common law is not static, but is constantly undergoing change, and extension, to meet changing conditions due to the ever expanding business and social fabric." (*Id.*, 239 Ala. at 220, 194 So. at 658)

The Court also noted in *Swartz v. United States Steel Corporation*, 293 Ala. 439, 304 So.2d 881 (1974):

> "The common law is decisional law. It is not *frozen* into unchangeable tables of stone." (*Id.*, 293 Ala. at 442) (emphasis added)

The Court also stated in *Buchanan v. Merger Enterprises, Inc.*, 463 So.2d 121 (Ala. 1984):

> "Inherent in the common law is a dynamic principle which allows it to grow and to tailor itself to meet changing needs within the doctrine of *stare decisis*, which, if correctly understood, was not static and did not forever prevent the courts from reversing themselves or from applying principles of common law to new situations as the need arose. If this were not so, we must succumb to a rule that a judge should let others "long dead and unaware of the problems of the age in which he lives do his thinking for him." (*Id.*, 463 So.2d at 127 (quoting Mr. Justice Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949)

The Alabama Supreme Court, like its sister state courts, has recognized many causes of action at the common law since the Alabama Constitution of 1901. A wife's cause of action for loss of consortium was recognized in *Swartz v. United States Steel Corporation*, 293 Ala. 439, 304 So.2d 881 (1974). Other judicially recognized causes of action such

as the Alabama Extended Manufacturer's Liability Doctrine and *bad faith* failure to pay an insurance claim were recently cited as examples of recognized causes of action that "are part of the warp and woof of the common law." *Henderson v. Alabama Power Company*, 627 So.2d 878, 385 (Ala. 1993) The Texas Supreme Court noted in 1987 that twenty-nine (29) states had judicially recognized a common law action against purveyors of alcohol for injuries caused by an intoxicated customer – including the State of Alabama. (See *El Chico Corporation v. Poole*, 732 S.W.2d 306, 310 (Tex. 1987) The *El Chico* Court noted:

> "As demonstrated by the actions of the majority of states, the common law is not *frozen* or stagnant, but evolving, and it is the duty of this court to recognize the evolution." (*Id.*, 732 S.W.2d at 310) (emphasis added)

Petitioner's argument that the common law must be "frozen" into the calendar year 1901 is not only specious but dangerous when taken to its logical limits. This "freezing" would eviscerate the very nature of the common law. This "freezing" would ignore the changes and growth that have occurred in the insurance industry since that time. It would ignore the changes in the fabric of business and society that the common law was intended to be able to respond to in the natural evolution of our society.

Petitioner argues that equal protection of the law mandates a decision that Alabama's bad faith law violates this insurer's guaranteed right to trial by jury as set forth in Section 11 of the Alabama Constitution. (Petitioner's Brief at p. 13) The Alabama Supreme Court wrote

a lengthy and exhaustive opinion in this case. (See appendix of Petitioner's Brief for the full text of the opinion.) The Court affirmed the verdict of the jury and subsequent denial of Petitioner's Motion for J.N.O.V. based on the jury's award of $57,500.00 compensatory damages and $75,000.00 in punitive damages. The Alabama Supreme Court made a detailed analysis of the bad faith conduct of the Petitioner that was confirmed by the evidence presented at trial. The Court recited the observations by the trial judge that the Petitioner's conduct was "akin to the old carnival trial of which shell is the pea under?" (Opinion in Petitioner's Brief at p. 15A) The Alabama Supreme Court further observed that it could not condone the actions of this Petitioner in "creating" uncertain standards as it had in this case to enable it to avoid payment of a valid claim. (Opinion in Petitioner's Brief at p. 17A) The Court also addressed the Petitioner's argument that the recognition of the bad faith cause of action violated its "frozen" rights to a jury trial. The Court stated that this argument was flawed because it confused the right to a trial with the right to a trial by jury. (Opinion in Petitioner's Brief at p. 19A) The Court observed that this attack would also question that Court's recognition of a list of other common law remedies that had been recognized since the Constitution of 1901, including the following:

1.) Tortious interference with business relations.

2.) The Alabama Extended Manufacturer's Liability Doctrine.

3.) Outrageous Conduct. (See Opinion in Petitioner's Brief at p. 18A)

The Court concluded by holding there had been no violation of the Petitioner's right to trial by jury nor any violation of its Equal Protection guarantees. (Opinion in Petitioner's Brief at p. 20A) No application for Rehearing was filed by Petitioner and the records do not reflect any notification of the Attorney General of the State of Alabama regarding an assertion that this case is unconstitutional.

CONCLUSION

The direct attack made by Petitioner on the principles of common law is so broad yet so unfounded as to make it difficult to address. It is an argument conducted in a mist or fog of particles of misconstrued quotes that have no substance. The Alabama Supreme Court acted responsibly and properly in its recognition of the tort of bad faith. Our principles of federalism, state's rights and the common law itself support this action. There is no constitutional infirmity in the recognition of this common law remedy. Indeed, this Court reviewed Alabama's common law fraud remedies in *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 113 L.Ed.2d 1, 111 S.Ct. 1032 (1991) This Court noted in *Haslip* that it could not say that Alabama's common law rule providing for the recovery of punitive damages in the insurance context did not rationally advance the state's interests in minimizing fraud. (*Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1 at 15.) This Court noted the traditional common law approach for assessing punitive awards has long been approved and cited *Day v. Woodworth*, 13 How. 363, 14 L.Ed. 181 (1852) (See *Haslip*, supra, 499 U.S. 1, 15). The

Alabama Supreme Court has noted that bad faith is a species of fraud. *Chavers v. National Security Fire & Casualty Company*, 405 So.2d 1 (Ala. 1981) Therefore, this initial recognition was tied to the evolution of actions for fraud.

Respondent urges this Court to recognize the inherent common law propriety of Alabama's recognition of the tort of bad faith and to refuse the petition filed herein.

Respectfully submitted,

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